Boston University School of Law
Transcript Guide

SYMBOLS OR ABBREVIATIONS

AUD	Audit	**H**	Honors
CR	Credit	**NC**	No credit
P	Pass	**F**	Fail
W/D	Withdrawal from course		
*	Indicates currently enrolled		
(C)	Clinical		
(S)	Seminar		
(Y)	Year-long course		

Academic Qualifications – JD Program: The School of Law has a letter grading system in courses and seminars. The minimum passing grade in each course and seminar is a **D**. Beginning with the Class of 2017, a minimum of eighty-five passing credit hours must be completed for graduation. Prior classes required a minimum of eighty-four passing credit hours. The minimum average for good standing is C (2.0) and the minimum average for graduation is C+ (2.3). Prior to 2006 the minimum average for good standing and graduation was C (2.0).

GRADING SYSTEM

1. **Current Grading System** The following letter grade system is effective fall 1995. The faculty has set the following as an appropriate scale of numerical equivalents for the letter grading system used in the School of Law:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

For all courses and seminars with enrollments of 26 or more, grade distribution is mandatory as follows:

A+	0-5%
A+, A, A-	20-30%
B+ and above	40-60%
B	10-50%
B- And below	10-30%
C+ and below	0-10%
D, F	0-5%

2. **Fall 1995-Spring 2008**
For **first-year courses** with enrollment of twenty-six or more, grade distribution is mandatory as follows:

A+	0-5%
A+, A, A-	20-25%
B+ and above	40-60%
B	10-50%
B- and below	10-30%
C+ and below	5-10%
D, F	0-5%

3. **1991 Changes to Letter Grade System.**
The curve is mandatory for all seminars or courses with enrollments of twenty-six or more.

Grade	Number Equivalent	Curve
A+	4.5	
A	4.0	15-20%
B+	3.5	
B	3.0	50-60%
C+	2.5	
C	2.0	20-35%
D	1.0	
F	0	

The median for all courses with enrollments of twenty-six or more is B. For smaller courses, a median of B+ is recommended but not required.

GRADES FOR COURSES TAKEN OUTSIDE THE SCHOOL OF LAW

Grades for courses taken outside of BU Law are recorded as transmitted by the issuing institution or as CR. Credit toward the degree is granted for these courses and no attempt is made to convert those grades to the BU Law grading system. The grade is not factored into the law school average.

CLASS RANKS

BU Law does not rank students in the JD program with the following exceptions:

Mid-Year Ranks

Effective May 2014, the Registrar is authorized to release the g.p.a. cut-off points to the top 5%, 10%, 15%, 20%, 25% and one-third for the fifth semester in addition to third semester reporting adopted May 2013 and yearly reporting of the same.

Effective January 2013

For students who have completed their third semester, with respect to the cumulative average earned during the fall semester, the Registrar will inform the top fifteen students of their rank and will provide g.p.a. cut-off points for the top 10 percent, 25 percent and one-third of the class. This is in addition to the yearly reporting described below.

Effective May 2011

For students who have completed their first year, the Registrar will inform the top five students in each section of their section rank and will provide grade point average cut-offs for the top 10 percent, 25 percent and one-third of each section.

For students who have completed their second year or third year, with respect to both the average earned during the most recent year and cumulative average, the Registrar will inform the top fifteen students of their rank and will provide g.p.a. cut-off points for the top 10 percent, 25 percent and one-third of the class.

Class of 2008 and subsequent classes through April 2011.

For students who have completed their first year, the Registrar will inform the top five students in each section of their section rank and will provide g.p.a. cut-off points for the top 10 percent of each section.

For students who have completed the second year or third year, with reference to both the second-year or third-year g.p.a. and cumulative g.p.a., the Registrar will inform the top fifteen students in the class of their ranks and will provide g.p.a. cut-off points for the top 10 percent of the class.

Scholarly Categories
(Based on yearly averages only)

Class of 2008 and subsequent classes:
First Year – the top five students in each first-year section will be designated G. Joseph Tauro Distinguished Scholars. The remaining students in the top ten percent of each first-year section will be designated G. Joseph Tauro Scholars.

Second Year – the top fifteen students in the second year class will be designated Paul J. Liacos Distinguished Scholars. The remaining students in the top ten percent of the second-year class will be designated Paul J. Liacos Scholars.

Third Year – the top fifteen students in the third year class will be designated Edward F. Hennessey Distinguished Scholars. The remaining students in the top ten percent of the third-year class will be designated Edward F. Hennessey Scholars.

Graduate Program Transcript Guides

LL.M. in Taxation

Current Grading System:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

The grade averages of continuing part-time students whose enrollment began before the fall 1995 semester were converted to the new number equivalents.

Fall 1991 to Spring 1995
From the fall 1991 semester through the spring 1995 semester, the following letter grading system was in effect for students who were graduated before the fall 1995 semester:

A+	4.5	C+	2.5
A	4.0	C	2.0
B+	3.5	D	1.0
B	3.0	F	0.0

Current Degree Requirements
Effective May 2016, completion of 24 credits. Minimum average of 2.3 and no more than one grade of D.

Spring 1993 to Fall 2015
Completion of 24 credits. Minimum average of 3.0 and no more than one grade of D.

Fall 1991 to Fall 1993
Completion of ten courses (20 credits). Minimum average of 3.0 (with no more than one grade below 1.0).

LL.M. in Banking and Financial Law

Current Grading System

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

Current Degree Requirements
Effective April 2016, completion of 24 credits with a minimum average of 2.7 and no more than one grade of D or F.

Fall 2012 to Spring 2016
Completion of 24 credits with a minimum average of 3.0 and no more than one grade of D or F.

Fall 1991 to Fall 2012
Completion of ten courses (20 credits). Minimum average 3.0 (with no more than one grade below 1.0).

LL.M. in American Law

Current Grading System:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

Current Degree Requirements
Completion of twenty-four course credits with at least ten credits per semester. The minimum average for good standing and graduation is 2.3. Minimum course average is 2.0.

LL.M. in Intellectual Property Law

Current Grading System:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
C-	2.7		

Current Degree Requirements
Completion of twenty-four course credits with at least ten credits per semester. The minimum average for good standing and graduation is 2.3. Minimum course average is 2.0.

Executive LL.M. in International Business Law

Current Grading System:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

Current Degree Requirements
Effective Spring 2014, completion of twenty credits with a minimum g.p.a. of 3.0 including the successful completion (CR) of two colloquia.

Grading System prior to Spring 2014

Honors (H)	Credit (CR)
Very Good (VG)	No Credit (NC)
Pass (P)	Fail (F)

Requirements Prior to Spring 2014
Completion of six courses (18 credits) and two colloquia (2 credits) for a total of 20 credits. The minimum passing grade for each course is Pass (P). The minimum passing grade for each colloquium is Credit (CR).

5/2016 rev2

Boston University's policies provide for equal opportunity and affirmative action in employment and admission to all programs of the University.

BU School of Law

Transcript Guide Addendum

JURIS DOCTOR PROGRAM
LL.M. IN AMERICAN LAW PROGRAM
LL.M. IN INTELLECTUAL PROPERTY LAW PROGRAM

Grading System – Distribution Requirements

Effective Fall 2019

For all courses and seminars with enrollments of 26 or more, grade distribution is mandatory as follows:

A+	2-5 %
A+, A	15-25%
A+, A, A-	30-40%
B+ and above	50-70%
B	15-50%
B- and below	0-15%
C+ and below	0-10%
D, F	0-5%

Fall 2020

The distribution requirement for Fall 2020 upper-class courses with 26 or more students was suspended. Upper-level courses with 26 or more students were required to conform to a B+ median.

Effective Spring 2021

For all upper-level courses with an enrollment of 26 or more a B+ median is required with the following additional constraints:

A+	Maximum 5%
A+, A, A-	Minimum 30%
B and below	Minimum 10%
B- and below	Maximum 15%
C+ and below	0-10%
D, F	0-5%

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Elyse Shireen Ardaiz (Shireen) has asked me to provide a letter of recommendation for her clerkship application and I am delighted to do so. Shireen was a student in my Economics of Intellectual Property Law seminar in the fall semester of 2022 at Boston University School of Law. The seminar is based largely on my book with Ron Cass, Laws of Creation (Harvard University Press, 2013), which provides an economic justification for the major doctrines of intellectual property law. Ron and I saw the book as necessary to counter the anti-intellectual property arguments that had come out of the legal academy over the last thirty years. The seminar is not designed to brainwash students but to give them a rigorous grounding in the economic considerations relevant to intellectual property. Shireen received an A+ in the seminar. She also worked for me as a research assistant in the spring semester of 2023.

As the grade indicates, Shireen did an excellent job in the seminar, taking part with thoughtful comments in the course meetings, and equally thoughtful written commentary on the readings. Her paper for the seminar, on extraterritoriality and trademark law, was an innovative, excellently written, and interesting project. I learned a great deal from her paper. Her paper argues that the extraterritoriality rules applicable to antitrust law should be extended to trademark law, and makes an impressive argument that the two bodies of law are sufficiently similar that the reach of the laws should be the same in both areas. I thought this was a neat way of resolving the extraterritoriality problem, because the problem viewed in the abstract is quite hard to solve. Were I to approach the problem on my own, I might try to answer it on the basis of economic incentive arguments, but I don't think I would have reached an answer that is more persuasive than her answer.
I have students in my seminar present their papers to the class late in the term. Students are often shy or reluctant about presenting their work. Shireen, however, was a reliable and excellent presenter. If I recall correctly, she offered to do an extra presentation near the end of the term, but I had to tell her that she had filled her quota of presentations for the seminar.

Shireen has edited a number of my papers as a research assistant, and helped with research as well. I have found her guidance very helpful. She is prompt and clear about what she can get done, within a certain time frame. I find this alone extremely helpful because I have had many research assistants who have done excellent work, but have not been very good at explaining what they will complete and within what time frame. Moreover, I am aware that she is heavily involved in many organizations in the law school, often with leadership positions, in addition to Law Review. She cares deeply about these organizations. I have had many conversations with her about Law Review, and her ideas for improving the organization. We have discussed ways in which Law Review could be reformed to make the experience more valuable for students.

As this letter hopefully conveys, I have been quite favorably impressed by Shireen, and would be only too happy to provide additional comments on her behalf if there is any need for them. I believe she has a great career ahead of her.

Sincerely,

Keith N. Hylton

William Fairfield Warren Distinguished Professor
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June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in enthusiastic support of Shireen Ardaiz's application for a clerkship in your chambers. Shireen is very smart, extremely hard-working, organized, and ambitious. And she's a talented writer. In short, she has all the qualities of an excellent clerk. After being impressed by her in both first-year Criminal Law and upper-level Criminal Procedure, I can recommend her to you very strongly.

In Criminal Law, Shireen was a productively intense presence from the very beginning of the semester. A steady participant in class, she also frequently joined me at the podium or in office hours after class to ask questions about doctrine or, especially, to discuss the larger context in which criminal doctrine and criminal institutions work. Her curiosity was lawyerly but informed by a concern with the larger world and the impact that the law can and does have beyond its stated goals. All the while, her manner was the perfect combination of appropriately deferential and determinedly inquisitive about the issues that mattered most to her. I became a big fan early in the semester and looked forward especially to those moments where she challenged me with questions I couldn't fully answer about the real-world implications of some of the law we discussed. I recall especially her readiness to question me about exactly why and how we might discuss the sensitive topic of rape law in our class, given that this offense has always had a profound impact on some number of students in the room. After I agreed that it would be worth a try to take only volunteers on that subject—no cold-calling—she proved to be the first person with her hand up in class. It's not that she was so eager to talk about rape law in front of 75 classmates but that she felt a responsibility to support me in making the class work after she had lobbied me to go with the all-volunteer format. As expected, she performed admirably in discussing the case that she volunteered for. She followed up this strong semester in and out of the classroom with one of the best exams in the class, earning her A in the course. Shireen was one of that handful of students who could and did contribute to the course in a way that made it meaningfully better for herself, for her classmates, and for me.

In Criminal Procedure, Shireen's experience was a little different. Her third semester of law school began in a challenging way. She was both sick and overextended for much of the first half of the semester. As you can see from her resume, her ambitions led her to take on not just Law Review but Moot Court (where she was quite successful), leadership positions in student groups, and service as a teaching assistant. When combined with a full complement of demanding classes, it was really too much, as I told her at the time, and she has learned to commit herself more judiciously since that time. But, even as I thought she would drown in my course and elsewhere, she in fact finished strong and pulled out excellent grades. Her exam for me was not as comprehensively strong as in Criminal Law but still showcased her lawyerly smarts. She came out with an admirable A- in Crim Pro amid a successful semester across the board that included an A+ as well. And she did this without compromising her other ambitions: first, winning Best Brief in our moot court competition, which set her up to reach the quarterfinals in the next semester; and second, meeting all expectations on Law Review and earning a position on the editorial board for her third year. Her capacity to adjust mid-semester and find her way successfully through the workload she had assumed was enormously impressive to me, as was her capacity to absorb valuable lessons for the future.

Let me finish with the important subject of writing ability. As of now, I have not seen much finished writing from Shireen, apart from time-pressured exams. But I have seen just enough to be confident that she will give you the readable, concise, and analytically sharp memos and drafts that you may require of her. As noted, she won Best Brief in Moot Court and now mentors younger Law Review members in the writing of their Notes. Beyond that, though, I have also read part of her Moot Court brief and can confirm first-hand that she writes smoothly, clearly, and convincingly. You can judge for yourself, of course, but I feel very confident that she will give you written work product that will make your life easier every day.

In sum, Shireen has no downside as a clerkship applicant. I cannot tell you that she is the most accomplished student in her class, but I believe she is consistently effective in a way that many with higher grades cannot match. She really stands out for her capacity and desire to take on all the work you can give her while maintaining consistently high standards across all of her assignments. Over time, she may or may not prove to be in that rarefied stratum of truly brilliant clerks, but I don't believe that she will ever give you less than high quality work. I recommend Shireen Ardaiz to you with utmost confidence and enthusiasm.

Sincerely,

Gerry Leonard
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June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Shireen Ardaiz for a clerkship with you. Before I became the Director of Advocacy Programs at Boston University School of Law, I taught Lawyering Skills to a section of first-year students. Shireen immediately stood out to me as an engaged and committed law student. Over her first year of law school, that impression bore out, as Shireen was one of my most hard-working, enthusiastic, and successful students.

At BU Law, all first-year students participate in a year-long Lawyering Skills course as part of a small section of no more than twenty students, which allows each instructor to get to know the students very well. As you can see from her transcript, Shireen received an A in my class first semester, which reflects not only her natural facility for excellent legal analysis and clear writing, but also her ability to incorporate multiple modes of feedback to ultimately produce excellent work product. For example, I hold individual conferences with each student to go over assignment drafts for each assignment. Shireen came thoroughly prepared to every single conference we had, with a detailed agenda and a list of questions that demonstrated that she had thoroughly read and considered my comments. Shireen was also engaged during every class. Many first-year law students are hesitant to ask or answer questions in class, preferring instead to come to me after class or to send an email. Shireen always participated in class, to the benefit of all. Finally, Shireen always followed up with additional questions when she had them, to ensure that she understood what I was asking for.

I want to note here that Shireen's second semester grade in my class, an A-, is not a reflection of her ability or work. During her first year of law school, in her second semester, Shireen suffered from an extremely painful dental issue. Treatment was made more complicated due to an insurance problem. Initially, Shireen attempted to work through the pain without requesting an accommodation, but quickly realized that she needed to ask for help, something many first-year law students do not do. I gave her an extension on an assignment, but she was able to still complete her work without using the full extension. That said, the situation certainly had some impact on her work product. I know that her health situation also impacted her other spring semester grades. I believe her other grades and her work demonstrate her ability to excel.

In fact, Shireen earned much higher grades this fall despite being exceptionally busy. During her first two years of law school, Shireen has been involved in several of the programs I supervise. First, I worked with Shireen in our Negotiation and Client Counseling programs. During Shireen's first year of law school, she was a co-champion of our Negotiation Competition. She advanced to the ABA Regional Competition, which she and her teammate won, advancing them to the National Competition. Her team advanced to the semifinal round of that competition, which earned them an invitation to the International Negotiation Competition.
In her second year of law school, Shireen served as a Co-Chief Director of our Negotiation and Client Counseling Board. Although she and her co-directors encountered some hurdles in adjusting to a new board structure, Shireen ultimately executed a fun and successful internal Negotiation Competition, including running workshops for students and recruiting local attorneys to judge, and coaching our teams at their regional competitions. She took a supporting role in the spring, helping our Client Counseling Competition directors run an excellent competition during the very busy first week of the spring semester.

Additionally, Shireen competed in our Edward C. Stone Moot Court Competition during her 2L fall. She was assigned to work on what I felt was the competition's most challenging issue: whether a district court may certify a class under Rule 23(b)(3) of the Federal Rules of Civil Procedure based on a presumption that an increase in index prices can demonstrate class-wide antitrust impact sufficient for common issues to predominate in an industry with individually negotiated prices. Shireen excelled, analyzing and breaking down this complex procedural issue into clear, compelling arguments. She earned an award for Best Brief and an invitation to the Homer Albers Prize Competition, our spring honors competition.

Despite a busy spring semester, Shireen worked just as hard on the Albers problem as on everything else. In Albers, she was assigned to brief an argue a challenging and charged issue: whether the Second Amendment protects the right of undocumented persons to possess firearms. Her written work was once again excellent. Her research was thorough, her analysis was powerful, and her writing was clear and polished. I later learned that during the competition, in the spirit of collegiality (and within the rules!), Shireen organized several of her competitors to moot each other, so that they could all improve their oral arguments. In fifteen years, I have never had an Albers competitor take it upon themselves to organize moots to the benefit of all, and I was very impressed, but not surprised, to learn that Shireen was the driving force behind these practices. The extra effort paid off, as her argument scores helped her team advance to the quarterfinal round of the competition.

Finally, I want to emphasize that beyond Shireen's research and writing skills, she is a mentor to other students who strives to support her colleagues. This year, Shireen actively worked to grow MESALSA, organizing a mentorship program and events with law firms, among other services. She has worked to improve BU Law's diversity and inclusion, both on Law Review and more broadly. On a personal note, I've enjoyed teaching and working with Shireen. Like all law students, she sometimes stumbles, but I've rarely worked with a law student so interested in taking those mistakes and not just avoiding them in the future, but actively learning from them and improving. She not only is engaging and intelligent, but also truly cares about making a difference, both at BU Law and in the legal field. I believe that Shireen's particular strengths—her facility with legal research and analysis, her

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indomitable drive, and her collegiality—will make her an excellent law clerk. Therefore, I strongly recommend her for the position. Please contact me if you have any questions about her application.

Very truly yours,

Jennifer Taylor McCloskey, Esq.
Director, Advocacy Programs

E. SHIREEN ARDAIZ
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Writing Sample

The attached writing sample is an excerpt from a bench memorandum I drafted as an extern in Justice Wendlandt's chambers at the Massachusetts Supreme Judicial Court. The memorandum contained six issues, of which I drafted two. For the sake of brevity, I have included only the fourth issue. The memorandum analyzes whether a detective's narration of his observations of video evidence was inadmissible lay testimony or admissible to rebut the defendant's allegation that the police investigation was inadequate (known in Massachusetts as a *Bowden* defense).

I am submitting this writing sample with permission from Justice Wendlandt. All names and identifying details have been changed to preserve confidentiality. I performed all of the research for this memorandum, and although it was lightly edited by the supervising law clerk, this memorandum is substantially my writing.

d. Detective's testimony about video evidence. i. Relevant facts and procedural history. As part of the defendant's motion in limine to admit third-party culprit evidence, he moved to admit the ice cream parlor video footage. The trial judge allowed the admission of the video and advised that "the defense [might] cross-examine the lead investigator(s) about their investigation of Mr. Miller" because "[e]vidence of any investigation of him is relevant, will not cause confusion, and he is linked by time and place to the vicinity of the crime." As such, prior to Anderson's testimony, the trial judge advised that the Commonwealth could, in "anticipation" of the *Bowden* defense, "tell us everything about the investigation."

At trial, on direct examination, Anderson testified about what he observed in the ice cream parlor video footage and the significance of those observations to his investigation. In so doing, he referred to the movement of the silver vehicle, the attire of the individuals shown on camera, the identities of the individuals, and what he believed the video showed those individuals doing. The defense counsel successfully objected to instances in which the prosecutor's question or Anderson's testimony was ambiguous about whether it referred to what was shown on the video, as opposed to the conclusions Anderson drew from the video for the purposes of his investigation. After sustaining one such objection, explaining at sidebar that "there's a distinction between conclusions that the detective is drawing for the purposes of his investigation and what a jury can see," the judge instructed the jury that:

> There's obviously a big difference between what you see on a video and what someone else tells you they saw on a video right? As for all evidence in a jury trial, it is for you to determine what you see and what significance, if any, what you see has to you. The same way you listen to the testimony of a witness and decide what significance, if any, that testimony has to you. On the other hand, this witness conducted an investigation. It's fair for the Commonwealth to ask him why he did what he did and what conclusions he drew from what he did, but that's the distinction. Whether it's video or anything else, his state of mind, his decision making, his conclusions are fair game for him to tell you about. . . . The

> Commonwealth is going to make an effort to distinguish better in the questions between what this witness is seeing or concluding and your part of the job, which is always the same, which is to decide what you see and what you conclude.

The defense counsel did not object to the four portions of Anderson's testimony at issue: (1) that the driver leaving the scene was the defendant; (2) that the ice cream parlor video showed the victim slapping the defendant; (3) that the defendant was holding a gun; and (4) that Miller was standing away from where the shooting occurred.

The defense counsel asked for a jury instruction on identification by video in the final charge. The judge asked the defense counsel whether he was aware of any case law guiding such a jury instruction. The defense counsel suggested that the instruction given with Anderson's testimony would be acceptable. The judge indicated that while she thought a charge about all the evidence might be sufficient, she might refer to video evidence specifically. The final charge contained no specific instruction about video evidence. After the charge, the defense counsel stated he was content with the charge as given.

ii. Analysis on opinion testimony and jury instruction. The defendant argues that Anderson's narration of the ice cream parlor video footage was improperly admitted lay opinion evidence and that its inclusion, especially without a final jury instruction on video evidence, was "inadmissible and highly prejudicial." *See Commonwealth v. Wardsworth*, 124 N.E.3d 662, 684-85 (2019).

In support of his argument, the defendant likens his case to *Wardsworth*, in which this Court held that the admission of four police officers' repeated testimony about the extreme similarity between the defendant and the individual depicted on camera was improper. *See* 124 N.E.3d at 683-84. He also attempts to distinguish this case from *Commonwealth v. Grier* because here, the detective specifically testified to seeing the defendant on the surveillance footage. 191

N.E.3d 1003, 1026 (2022) (holding that detective's testimony merely "not[ing] in passing that a 'C' was visible on the left chest area of the individual" on surveillance footage but never directly connecting with logo on defendant's jacket did not cause unfair prejudice).

In response, the Commonwealth argues that because the defendant expressed his intention to raise a *Bowden* defense, he opened the door for investigators to testify about their investigative choices. *See Commonwealth v. Avila*, 912 N.E.2d 1014, 1023-24 (2009); *Commonwealth v. Lodge*, 727 N.E.2d 1194, 1201 (2000). The Commonwealth also analogizes Anderson's testimony to that of the detectives in *Commonwealth v. Chin*, 144 N.E.3d 923 (2020), and contends that Anderson's observations were not identification testimony because, as the motion judge explained, the defendant was "independently identified in numerous ways," the video was not offered as an exhibit or used at trial for identification purposes, and all witnesses testified to their own personal observations while watching the video.

The Commonwealth's comparison to *Chin* is inapposite. In *Chin*, the detectives "recounted their personal observations of what they saw in the video and compared those observations to their personal observations of the defendant's car" because "the car shown on the video recordings was not physically available for the jury to consider." 144 N.E.3d at 937. Here, Anderson had no personal familiarity with the defendant, and the defendant was not unavailable. Instead, *Commonwealth v. Suarez*, which compels the opposite result, is more appropriate. 129 N.E.3d 297, 306-07 (2019) (holding that detective's lay testimony identifying defendant on video, which contributed no information that jurors could not glean from video themselves, was inadmissible).

The Commonwealth then distinguishes *Wardsworth* in two ways. First, it points out that in *Wardsworth*, it was unclear "from the record that a *Bowden* defense was meaningfully raised."

124 N.E.3d at 686. Second, unlike here, the judge in *Wardsworth* "did not instruct the jury that the officers' identification testimony was admissible only for the limited purpose of rebutting a *Bowden* argument." *Id.* The Commonwealth responds to the defendant's attempt to distinguish *Grier* by arguing that because the defendant never contested that he was at the ice cream parlor before and at the time of the shooting, the identification of the defendant on the surveillance footage was not prejudicial to the defense. The Commonwealth further argues that because the judge issued a limiting instruction immediately after the contested testimony, that instruction cured any resulting prejudice, and thus, the jury's observations of the footage should control.

"[P]urportedly improper opinion evidence . . . objected to at trial" is reviewed "for prejudicial error." *Grier*, 191 N.E.3d at 1025. Evidence which was "not objected to at trial, we review for a substantial likelihood of a miscarriage of justice." *Id.* The defendant did not object to the admission of the ice cream parlor video footage or to the portions of the officer's narration under review here, so the miscarriage of justice standard applies. *See id.*

In general, "[a] lay opinion . . . is admissible only where it is '(a) rationally based on the perception of the witness; (b) helpful to … the determination of a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge.'" *Id.* (quoting *Commonwealth v. Canty*, 998 N.E.2d 322, 328 (2013) (quoting Mass. G. Evid. § 701 (2013))). "Where the jury are capable of viewing video or photographic evidence and drawing their own conclusions regarding what is depicted, a lay witness's testimony about the content of the video or photographs is admissible only if it would assist the jury in reaching more reliable conclusions." *Id.* "Making a determination of the identity of a person from a photograph or video image is an expression of an opinion." *Wardsworth*, 124 N.E.3d at 683 (quoting *Commonwealth v. Pina*, 116 N.E.3d 575, 592 (2019)). "When offered by a lay witness, such an opinion is admissible only where 'the subject

matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time.'" *Id.*

However, "if a defendant raises a *Bowden* defense, the Commonwealth has the right to rebut it" by "elicit[ing] testimony about what led the police to conduct the investigation in a particular way." *Avila*, 912 N.E.2d at 1022.

Here, Anderson's personal observations about the contents of the ice cream parlor footage would likely ordinarily be classified as lay evidence and would only be admissible if they met the requirements set out in Mass. G. Evid. § 701. As observations about "the content of the video or photographs," Anderson's testimony "is admissible only if it would assist the jury in reaching more reliable conclusions." *See Grier*, 191 N.E.3d at 1025. If, as the defendant argues, this testimony was identification testimony, then it would likely not be admissible, because Anderson was not "more likely to correctly identify the defendant from the photograph [or video evidence] than is the jury." *Commonwealth v. Vacher*, 14 N.E.3d 264, 279 (2014) (citation omitted); *see Grier*, 191 N.E.3d at 1025.

However, because the defendant announced his intention to present a *Bowden* defense, Anderson's testimony, including his identification testimony, was likely admissible because it was relevant to determining the adequacy of the investigation. *See Avila*, 912 N.E.2d at 1023-24 (holding that detective's testimony recounting witness's statements of defendant's guilt was admissible for purpose of rebutting allegations of inadequate investigation).

Admissibility of *Bowden* rebuttal evidence depends upon the defendant having "opened the door" while mounting his or her defense. *Avila*, 912 N.E.2d at 1026. A defendant "opens the door" where he or she "insert[s] into the case the relevance of the police judgment and decisions." *Lodge*, 727 N.E.2d at 1201. When a defendant elicits only the portion of a larger

piece of evidence which benefits him or her, the defendant "open[s] the door" for the prosecution to give the whole story of that evidence "to prevent misleading the jury by a fragmentary presentation." *See Avila*, 912 N.E.2d at 1026. The door is not "opened" where the prosecution "first introduce[s] the [specific] topic" to which the evidence is relevant, even if the defendant follows up with further questions on cross examination. *See id.* But if the central argument of the defense is to "attack[] the integrity and adequacy of the investigation throughout the trial, the Commonwealth [is] entitled to respond," even when a *Bowden* defense has not been explicitly raised. *Commonwealth v. Wiggins*, 81 N.E.3d 737, 747 (2017).

Although part of Anderson's contested testimony was elicited under direct examination, the defendant, by announcing his intention to raise a *Bowden* defense before trial and to rely upon surveillance footage to prove both the *Bowden* defense and the third-party culprit defense, "opened the door" to the Commonwealth to present "the whole story" of its investigation of the footage. *See Avila*, 912 N.E.2d at 1023-24 (holding that police testimony reciting witness's statement and explaining credibility thereof was admissible to rebut defendant's criticism of investigators' choice to not to follow other leads). Though the prosecutor was first to examine Anderson on the contents of the surveillance footage, she did not "first introduce" the topic, but rather addressed the defendant's overarching argument, which had already been introduced in motions in limine and in the defendant's opening statement. *See Wiggins*, 81 N.E.3d at 747 (holding that *Bowden* rebuttal evidence was admissible where defendant did not raise *Bowden* challenge by name, but where central theory of case was misidentification and defendant alleged inadequate investigation).

Weighing the admissibility of *Bowden* rebuttal evidence:

> is a delicate and difficult task, given the fine line between permissibly allowing a police officer to explain investigative decisions . . . and impermissibly allowing a

> police officer to offer an opinion about the guilt of the defendant, the credibility of a witness for the Commonwealth, or the strength of the Commonwealth's case.

Avila, 912 N.E.2d at 1023. "[A] *Bowden* defense is clearly a two-edged sword: the more wide-ranging the defendant's attack on the police investigation, the broader the Commonwealth's response may be," explaining not only why it did not pursue certain leads, but why it chose to pursue the defendant. *Id.* at 1024. "[T]he presentation of a *Bowden* defense can expand the usual evidentiary boundaries quite significantly." *Id.* at 1025.

Thus, the admissibility of a law enforcement officer's *Bowden* rebuttal testimony depends upon whether the testimony was explicitly connected to the officer's investigative decisions. *Compare Grier*, 191 N.E.3d at 1024-26 (holding that officers' identification testimony was admissible when presented in conjunction with officer's thought process about investigation), *with Wardsworth*, 124 N.E.3d at 683-84 (holding that, absent emphasis on relevance to investigation, officers' testimony about similarity of appearance between defendant and individuals on video was inadmissible). *Bowden* rebuttal testimony "followed directly by questions and answers . . . that explained more carefully the factors that led the police to focus on the defendant at that point" is more likely to be admissible. *Avila*, 912 N.E.2d at 1024. By contrast, "where the police detective respond[s] to a general question with a comprehensive account of the evidence against the defendant," that testimony is inadmissible. *Id.*

Here, Anderson's testimony about what he observed in the surveillance footage was likely admissible as an explanation of why he chose not to further investigate Miller and instead focused his investigation on the defendant. *See id.* (holding that detective's explanation of reasons for focusing on defendant was admissible following questions about what factors motivated his investigative choices). The Commonwealth's follow up questions about the significance of each of Anderson's observations to his investigation suggest that this case is more

akin to the contextualized inquiries and targeted answers in *Avila* than to the general questions and broad answers in *Lodge*. *Compare id.* at 1024-25, *with Lodge*, 727 N.E.2d at 1201-02 (holding that detective's recitation of "all the evidence against the defendant" in response to general question about why detective "had not done 'any of those things that [defense counsel] asked'" was improper).

Finally, failure to repeat "a limiting instruction during the final charge" that was made earlier in the trial is not error. *Commonwealth v. Gouse*, 965 N.E.2d 774, 784 (2012). Where "[t]he judge's instructions were clear, . . . we must presume the jury followed them." *Commonwealth v. Morales*, 800 N.E.2d 683, 693 (2003). Because the jury received a limiting instruction immediately following Anderson's testimony about his observations of the surveillance footage, it was likely unnecessary for the trial judge to repeat that specific limiting instruction during the final charge. *See Gouse*, 965 N.E.2d at 784; *Morales*, 800 N.E.2d at 693.

Applicant Details

First Name	**Rosemary**
Middle Initial	**N.**
Last Name	**Ardman**
Citizenship Status	**U. S. Citizen**
Email Address	**rardman@umaryland.edu**
Address	**Address** Street **1300 Saint Paul Street, #5** City **Baltimore** State/Territory **Maryland** Zip **21202** Country **United States**
Contact Phone Number	**5128156058**

Applicant Education

BA/BS From	**University of Texas-Austin**
Date of BA/BS	**December 2015**
JD/LLB From	**University of Maryland Francis King Carey School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=52102&yr=2011**
Date of JD/LLB	**May 30, 2024**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Maryland Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hoffmann, Diane
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(410) 706-7191

Carstens, Anne-Marie
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Graber, Mark
mgraber@law.umaryland.edu
(410) 706-2767

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 5, 2023

The Honorable Jamar Walker
U.S. District Court for the Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

Please consider my enclosed application for a clerkship in your chambers for the 2024-2025 term. I am currently a student at the University of Maryland Carey School of Law and will graduate in 2024. As the new Editor in Chief of the *Maryland Law Review* and a long-time employee of the ACLU of Maryland, my unique professional and academic experience has prepared me to support the work of your chambers.

My unusual path to a legal career drives my deep commitment to public service. I started college at the age of thirteen and began supporting myself financially a few years later, and I now attend law school while working full-time for the ACLU. Throughout my teens, I struggled with the challenges of being on my own at such a young age, transferring schools and taking time off in response to financial and familial challenges. My experience persevering through these obstacles—and ultimately graduating with honors from the University of Texas—instilled me with compassion, curiosity, and resilience that continue to guide my professional goals.

In law school, I have gained research and writing experience that prepares me to effectively contribute to the work of your chambers. As the new Editor in Chief of the *Maryland Law Review*—and the first evening student to ever hold that role—I collaborate with top scholars around the country to publish innovative academic work, and I lead a time of fifty students through a complex and tight publication process. This opportunity to engage deeply with legal scholarship across a variety of fields positions me to thrive in the diverse work of judicial clerk.

I also have significant practical legal experience, particularly at the federal level. This summer, I am gaining exposure to federal civil litigation through an internship with the Special Litigation Section of the Civil Rights Division of the Department of Justice. Last year, I interned with the Federal Public Defender for the District of Maryland, where I drafted motions, prepared internal strategic memoranda, and observed a variety of federal criminal proceedings. Additionally, I have spent over six years as the assistant to the ACLU of Maryland's Executive Director, a role that has prepared me for the sensitive and collaborative nature of a judicial clerkship.

Within, please find my resume, my law school and undergraduate transcripts, two writing samples, and three letters of recommendation. Thank you very much for your consideration.

Sincerely,

Rosemary Ardman

ROSEMARY NADIA ARDMAN

512-815-6058 | rardman@umaryland.edu | 1300 Saint Paul Street #5, Baltimore, MD 21202

EDUCATION

University of Maryland Carey School of Law | Baltimore, MD | J.D. Candidate | Expected May 2024 | GPA 4.17

Honors: Editor in Chief, *Maryland Law Review*, Volume 83
Paul D. Bekman Leadership in Law Scholar
Sondheim Public Service Law Fellow
Shale D. Stiller Public Interest Fellow
CALI Award (highest grade): Criminal Law, Lawyering I, Lawyering II, Legal Profession, Constitutional Law I, Constitutional Law II, Lawyering III, Torts, Employment Law, Comparative Jurisprudence

International Coursework:
Zomba, Malawi: Environmental Justice, Public Health, and Human Rights (May 2023)
Galway, Ireland: Comparative Constitutional Democracy (June 2022)

University of Texas at Austin | Austin, TX | B.A. English with Honors | Dec. 2015 | GPA 3.84

Honors: James F. Parker Memorial Essay Prize Runner-Up

PROFESSIONAL EXPERIENCE

Special Litigation Section, Civil Rights Division, U.S. Department of Justice | Washington, D.C.

Legal Intern *May 2023–Present*

Assist with investigations into systemic unlawful conduct by state and local officials related to conditions of confinement, juvenile justice, and the institutionalization of people with disabilities. Complete legal research and writing projects to support litigation and compliance monitoring.

ACLU of Maryland | Baltimore, MD

Executive Coordinator & Board Liaison *Apr. 2021–Present*

Manage projects for the Executive Director and Board of Directors. Serve on the Strategic Planning Leadership Team. Coordinate administrative and logistical matters for the executive department. Facilitate staff meetings. Supervise administrative support staff and volunteers.

Executive Assistant *Feb. 2017–Apr. 2021*

Provided administrative support to the Executive Director and Board of Directors. Managed filing systems and archival projects. Assisted with office operations.

Acting Development Associate *May 2017–June 2019*

Drafted grant proposals and reports worth over $750,000 annually in areas including criminal justice reform, immigrants' rights, fair housing, and education rights. Planned and executed philanthropic campaigns. Managed the development database.

Legal and Policy Intern *Oct. 2016–Feb. 2017*

Drafted legal documents and advocacy materials for a lawsuit challenging juvenile life without parole. Processed requests for legal assistance and corresponded with clients.

University of Maryland Carey School of Law | Baltimore, MD

Senior Legal Writing Fellow *Aug. 2022–Present*

Provide feedback on student legal and scholarly writing. Lead 1L writing workshops and drop-in sessions. Offer guidance and support to incoming Legal Writing Fellows.

Legal Writing Fellow *Aug. 2021–May 2022*

Competitively selected as one of eleven second-year students to staff the Writing Center, lead student writing workshops, and perform research and cite checking for legal writing faculty.

Research Assistant to Professor Michael Millemann *May 2021–May 2022*

Prepared research memos on criminal sentencing and prisoners' rights. Performed cite checking and substantive editing on scholarly articles.

Juvenile Division of the Circuit Court for Baltimore City | Baltimore, MD
Judicial Intern *Sep. 2022–Dec. 2022*
Conducted legal research in the areas of juvenile delinquency and child welfare to support the work of six magistrates in the Juvenile Division. Observe Child in Need of Assistance and delinquency hearings.

Federal Public Defender for the District of Maryland | Baltimore, MD
Legal Intern *May 2022–Aug. 2022*
Assisted with the defense of indigent clients in the federal criminal system by conducting research and drafting legal filings including motions to suppress evidence, grant compassionate release, and terminate supervised release. Attended client meetings and court proceedings.

PUBLICATIONS

The Larry Nassar Hearings: Victim Impact Statements, Child Sexual Abuse, and the Role of Catharsis in Criminal Law, 82 MD. L. REV. 782 (2023), https://digitalcommons.law.umaryland.edu/mlr/vol82/iss3/7/.

COMMUNITY INVOLVEMENT

Maryland Public Interest Law Project | *Co-Treasurer* *Aug. 2020–Present*
Oversee a budget of $150,000 for a student-run 501(c)(3) nonprofit dedicated to providing grants to students pursuing unpaid summer public interest internships.

University of Maryland Carey School of Law | *Peer Advisor* *May 2023–Present*
Provide mentorship and academic support to first-year law students.

Maryland Parole Project | *Legal Volunteer* *Dec. 2021–Feb. 2022*
Reviewed and summarized trial documents to help prepare an exoneration argument for a client convicted of murder. Contributed to a guide to the parole process for lawyers representing individuals serving life sentences.

Student Bar Association | *Evening Class Vice President* *Sep. 2020–May 2023*
Served as a liaison between the evening class, the student body, and the school administration. Planned class activities and events.

REFERENCES

Professor Leslie Meltzer Henry
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Professor Michael Millemann
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Professor William Moon
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Ms. Dana Vickers Shelley
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Ms. Laura Abelson
Assistant Public Defender, Office of the Public Defender for the District of Maryland
443-851-0903 | laura_abelson@fd.org

(/StudentSelfService/)

Ms. Rosemary Nadia Ardman

Student Academic Transcript

Academic Transcript

Transcript Level

School of Law

Transcript Type

Academic Record

Student Information | Degrees Awarded | Institution Credit | Transcript Totals | Course(s) in Progress

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Student Information

Name

Rosemary Ardman

Curriculum Information

Current Program : Juris Doctor

Program

Law Evening

Major and Department

Law, Law

Degrees Awarded

In Progress

Juris Doctor

Curriculum Information

Primary Degree

Major

Law

Institution Credit

Term : Fall 2020

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	506E	LW	CRIMINAL LAW	A+	3.000	12.99		
LAW	527E	LW	CIVIL PROCEDURE	A	4.000	16.00		
LAW	550E	LW	INTRODUCTION TO LEGAL RESEARCH	A	1.000	4.00		
LAW	564E	LW	LAWYERING I	A	2.000	8.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	10.000	40.99	4.10
Cumulative	10.000	10.000	10.000	10.000	40.99	4.10

Term : Spring 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	534E	LW	PROPERTY	A	4.000	16.00		
LAW	558H	LW	LEGAL PROFESSION	A+	3.000	12.99		
LAW	565E	LW	LAWYERING II	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	10.000	40.99	4.10
Cumulative	20.000	20.000	20.000	20.000	81.98	4.10

Term : Fall 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	528E	LW	CON LAW I: GOVERNANCE	A+	3.000	12.99		
LAW	530E	LW	CONTRACTS	A	4.000	16.00		
LAW	566E	LW	LAWYERING III	A+	3.000	12.99		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	10.000	41.98	4.20
Cumulative	30.000	30.000	30.000	30.000	123.96	4.13

Term : Spring 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	514Q	LW	COMP JURIS SEM:TRANSCULTURE	A	3.000	12.00		
LAW	529A	LW	CON LAW II: INDIVIDUAL RIGHTS	A+	3.000	12.99		
LAW	535E	LW	TORTS	A+	4.000	17.32		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	10.000	42.31	4.23
Cumulative	40.000	40.000	40.000	40.000	166.27	4.16

Term : Summer 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	563M	LW	SPEC TOP IN COMP CONST'L DEMOC	CR	2.000	0.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	2.000	2.000	2.000	0.000	0.00	
Cumulative	42.000	42.000	42.000	40.000	166.27	4.16

Term : Fall 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	515D	LW	CRIMINAL PROCEDURE	A	3.000	12.00		
LAW	531C	LW	MARYLAND LAW REVIEW	CR	1.000	0.00		I
LAW	544S	LW	ASPER JUDICIAL EXT WORKSHOP	CR	1.000	0.00		
LAW	554F	LW	EMPLOYMENT LAW	A+	3.000	12.99		
LAW	579B	LW	EXTERNSHIPS	CR	2.000	0.00		
LAW	595S	LW	ENV JUS, HUMAN RGTS & PUB HLTH	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	13.000	13.000	13.000	9.000	36.99	4.11
Cumulative	55.000	55.000	55.000	49.000	203.26	4.15

Term : Spring 2023

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	503C	LW	INTERNATIONAL LAW	A+	3.000	12.99		
LAW	505S	LW	REPRODUCTIVE JUSTICE & LAW SEM	A+	3.000	12.99		
LAW	506F	LW	ADVANCED LEGAL RESEARCH	A-	1.000	3.67		
LAW	528K	LW	HLS:COMP HLTH LAW & POLICY	A+	3.000	12.99		
LAW	531C	LW	MARYLAND LAW REVIEW	CR	1.000	0.00		I

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	11.000	11.000	11.000	10.000	42.64	4.26
Cumulative	66.000	66.000	66.000	59.000	245.90	4.17

Transcript Totals

Transcript Totals - (School of Law)	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution	66.000	66.000	66.000	59.000	245.90	4.17
Total Transfer	0.000	0.000	0.000	0.000	0.00	0.00
Overall	66.000	66.000	66.000	59.00	245.90	4.17

Course(s) in Progress

Term : Fall 2023

Subject	Course	Level	Title	Credit Hours	Start and End Dates
LAW	531C	LW	MARYLAND LAW REVIEW	4.000	
LAW	544K	LW	INTERNATIONAL LABOR LAW: SEM	3.000	
LAW	578B	LW	EVIDENCE	3.000	
LAW	583F	LW	FEDERAL COURTS	3.000	

THE UNIVERSITY OF TEXAS AT AUSTIN

OFFICE OF THE REGISTRAR, MAIN BLDG. ROOM 1, AUSTIN, TX 78712-1157, (512) 475-7575

FICE CODE: 3658 IPEDS CODE: 228778 ATP CODE: 6882 ACT CODE: 4240

FACSIMILE TRANSCRIPT

NAME: DAMMANN, ROSEMARY STUDENT ID: XXX-XX-0683 DATE: 02/12/23
DOB: 11/10/93 PAGE: 1

DEGREES AWARDED BY THE UNIVERSITY OF TEXAS AT AUSTIN:

DEGREE: BACHELOR OF ARTS
WITH HONORS
DATE: DECEMBER 19, 2015
MAJOR: ENGLISH

HIGH SCHOOL: WOODSTOCK HIGH SCHOOL CLASS OF 2009
WOODSTOCK GA

ATTENDED: UNIVERSITY OF WEST GEORGIA FALL 2007 SUMMER 2008

ATTENDED: GEORGIA INSTITUTE OF TECHNOLOGY FALL 2009 FALL 2010

ATTENDED: DALTON STATE COLLEGE SUMMER 2011 FALL 2011

TRANSFERRED WORK FROM UNIVERSITY OF WEST GEORGIA

DATE	ORIGINAL COURSE DESIGNATION		GR/CR		UT EQUIVALENT	
FALL, 2007	BIOL 1107	PRINCIPLES OF BIOLOGY	CR	3	BIO 3 FRMN	3
FALL, 2007	BIOL 1107L	PRIN OF BIOLOGY I LAB	CR	1	BIO 1 LAB	1
FALL, 2007	BIOL 1108	PRINCIPLES OF BIOLOGY	CR	3	BIO 3 FRMN	3
FALL, 2007	BIOL 1108L	PRIN OF BIOLOGY II LA	CR	1	BIO 1 LAB	1
FALL, 2007	CHEM 1211K	PRINCIPLES OF CHEMIST	A	4	CH 301	3
FALL, 2007	CHEM 1211L	PRINCIPLES OF CHEMIST	A		CH 204A	1
FALL, 2007	ENGL 2120	BRITISH LITERATURE-HO	A	3	E 316K	3
FALL, 2007	MATH 1113	PRECALCULUS	A	4	M 405G	4
FALL, 2007	PSYC 1101	INTRO TO GENERAL PSYC	A	3	PSY 301	3
SPRING, 2008	ENGL 1101	ENGLISH COMPOSITION I	CR	3	RHE 306	3
SPRING, 2008	ENGL 1102	ENGLISH COMPOSITION I	CR	3	RHE 309K	3
SPRING, 2008	BIOL 2120	BIOL COMPUTER APPLICA	A	1	BIO 1 HR	1
SPRING, 2008	BIOL 2130	SOPHOMORE BIOLOGY SEM	A	1	BIO 1 HR	1
SPRING, 2008	BIOL 2134	MOLECULAR CELL BIOLOG	B	3	BIO 3 SOPH	3
SPRING, 2008	BIOL 2134L	MOLECULAR CELL BIOLOG	A	1	BIO 1 LAB	1
SPRING, 2008	BIOL 2135	ECOLOGY,EVOLUTION,EXP	B	3	BIO 3 SOPH	3
SPRING, 2008	BIOL 2135L	ECOLOGY,EVOLUT, EXPER	A	1	BIO 1 LAB	1
SPRING, 2008	CHEM 1212K	PRINCIPLES OF CHEMIST	A	4	CH 302	3
SPRING, 2008	CHEM 1213K	PRINCIPLES OF CHEMIST	A		CH 204B	1
SUMMER, 2008	ANTH 1102	INTRO TO ANTHROPOLOGY	A	3	ANT 302	3
SUMMER, 2008	HIST 1112	SURV WORLD HIST/CIVIL	A	3	HIS 3 HRS	3
SUMMER, 2008	PSYC 3730	SOCIAL PSYCHOLOGY	A	4	PSY 419K	4

TRANSFERRED WORK FROM GEORGIA INSTITUTE OF TECHNOLOGY

DATE	ORIGINAL COURSE DESIGNATION		GR/CR		UT EQUIVALENT	
FALL, 2009	HIST 2111	UNITED STATES TO 1877	CR	3	HIS 315K	3
FALL, 2009	POL 1101	GOVERNMENT OF THE U S	CR	3	GOV 3 U S	3
FALL, 2009	MATH 1501	CALCULUS I	C	4	M 408K	4
FALL, 2009	BIOL 2354	HONORS GENETICS	A	3	BIO 3 SOPH	3
FALL, 2009	BIOL 2355	HONORS GENETICS LAB	A	1	BIO 1 LAB	1
FALL, 2009	INTA 3101	INT'L INSTITUTIONS	A	3	ELV 3 HRS	3
FALL, 2009	PSYC 2015	RESEARCH METHODS	B	4	PSY 4 HRS	4
SPRING, 2010	MATH 1502	CALCULUS II	C	4	M 408L	4
SPRING, 2010	LCC 3226	MAJOR AUTHORS	B	3	E 3LTADV	3
SPRING, 2010	PSYC 4100	BEHAVIORAL PHARMACOLO	A	3	PSY 3 ADV	3
FALL, 2010	PST 4174	PERSPECTIVES-SCI & TE	B	3	PHL 3 ADV	3
FALL, 2010	PSYC 3020	BIOPSYCHOLOGY	B	3	PSY 3 ADV	3

TRANSFERRED WORK FROM DALTON STATE COLLEGE

DATE	ORIGINAL COURSE DESIGNATION		GR/CR		UT EQUIVALENT	
SUMMER, 2011	PHED 1030	HEALTH & WELLNESS CON	A	1	KIN 1 HR	1

MORE WORK ON NEXT PAGE

THE UNIVERSITY OF TEXAS AT AUSTIN

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FICE CODE: 3658 IPEDS CODE: 228778 ATP CODE: 6882 ACT CODE: 4240

FACSIMILE TRANSCRIPT

NAME: DAMMANN, ROSEMARY STUDENT ID: XXX-XX-0683 DATE: 02/12/23
DOB: 11/10/93 PAGE: 2

FALL,	2011	BIOL 4360K	COMPARATIVE VERTEBRAT	A	4	BIO 3 ADV	3
FALL,	2011	BIOL 4360K	COMPARATIVE VERTEBRAT	A		BIO 1LBADV	1
FALL,	2011	CHEM 3311K	QUANTITATIVE ANALYSIS	A	4	CH 4 ADV	4
FALL,	2011	COMM 1110	FUNDAMENTALS OF SPEEC	A	3	CMS 305	3
FALL,	2011	MATH 2200	INTRODUCTION TO STATI	B	3	M 316	3

TOTAL HOURS TRANSFERRED: 104

COURSEWORK UNDERTAKEN AT THE UNIVERSITY OF TEXAS AT AUSTIN

FALL SEMESTER 2013 LIBERAL ARTS

LAT	506	FIRST-YEAR LATIN I	5.0	A-
E	349S	DELILLO AND ERDRICH	3.0	A
E	363	THE POETRY OF MILTON	3.0	A
LIN	306	INTRO TO THE STUDY OF LANGUAGE	3.0	A

HRS UNDERTAKEN 14 HRS PASSED 14 GPA HRS 14 GR PTS 54.35 GPA 3.8821
UNIVERSITY HONORS FALL SEMESTER 2013

SPRING SEMESTER 2014 LIBERAL ARTS

E	321	SHAKESPEARE: SELECTED PLAYS	3.0	A
E	343L	MODERNISM AND LITERATURE	3.0	A
GER	506	FIRST-YEAR GERMAN I	5.0	A-
HIS	356K	MAIN CURR AMER CUL SINCE 1865	3.0	A

HRS UNDERTAKEN 14 HRS PASSED 14 GPA HRS 14 GR PTS 54.35 GPA 3.8821
UNIVERSITY HONORS SPRING SEMESTER 2014

FALL SEMESTER 2014 LIBERAL ARTS

E	349S	8-VIRGINIA WOOLF	3.0	A
E	376	CHAUCER	3.0	A
GER	507	FIRST-YEAR GERMAN II	5.0	B
PHL	317K	INTRO TO PHILOS OF THE ARTS	3.0	A

HRS UNDERTAKEN 14 HRS PASSED 14 GPA HRS 14 GR PTS 51.00 GPA 3.6428
UNIVERSITY HONORS FALL SEMESTER 2014

SPRING SEMESTER 2015 LIBERAL ARTS

E	349S	RICHARD WRIGHT	3.0	A-
E	376M	AMER DREAM IN COMP CONTEXT	3.0	A-
E	379R	NEW YORK SCH POETS AND ARTISTS	3.0	A

HRS UNDERTAKEN 9 HRS PASSED 9 GPA HRS 9 GR PTS 34.02 GPA 3.7800

SUMMER SEMESTER 2015 LIBERAL ARTS

CRW	S325F	FICTION WRITING	3.0	A
GER	N612	ACCEL SEC-YR GER: READ MOD GER	6.0	A

HRS UNDERTAKEN 9 HRS PASSED 9 GPA HRS 9 GR PTS 36.00 GPA 4.0000

FALL SEMESTER 2015 CREDIT BY EXAM

GOV	310L	AMERICAN GOVERNMENT	3.0	CR
BIO	311D	INTRODUCTORY BIOLOGY II	3.0	CR
BIO	311C	INTRODUCTORY BIOLOGY I	3.0	CR

FALL SEMESTER 2015 LIBERAL ARTS

E	314V	4-GAY & LESBIAN LIT & CULTURE	3.0	A-
E	379R	TRAUMA AND LITERATURE	3.0	A
HIS	350L	WHEN CHRIST WAS KING	3.0	A

MORE WORK ON NEXT PAGE

THE UNIVERSITY OF TEXAS AT AUSTIN

OFFICE OF THE REGISTRAR, MAIN BLDG. ROOM 1, AUSTIN, TX 78712-1157, (512) 475-7575

FICE CODE: 3658 IPEDS CODE: 228778 ATP CODE: 6882 ACT CODE: 4240

FACSIMILE TRANSCRIPT

NAME: DAMMANN, ROSEMARY STUDENT ID: XXX-XX-0683 DATE: 02/12/23
DOB: 11/10/93 PAGE: 3

CONTINUE FALL SEMESTER 2015 LIBERAL ARTS
HRS UNDERTAKEN 9 HRS PASSED 9 GPA HRS 9 GR PTS 35.01 GPA 3.8900

CUMULATIVE TOTALS EARNED AS AN UNDERGRADUATE STUDENT AT U.T. AUSTIN
HRS UNDERTAKEN 78 HRS PASSED 78 GPA HRS 69 GR PTS 264.73 GPA 3.8366

*** E N D O F T R A N S C R I P T ***

TSI STATUS INFORMATION

TSI AREA	TSI STATUS	EXPLANATION
ALL	EXEMPT	TRANSFER - OUT OF STATE/PRIVATE/INDEPENDENT

TEC 51.907 UNDERGRADUATE COURSE DROP COUNTER: X

CORE CURRICULUM SUMMARY

CORE CURRICULUM COMPLETE

THE UNIVERSITY OF TEXAS AT AUSTIN
Office of the Registrar

SEMESTERS, SESSIONS, AND TERMS: An academic year consists of consecutive fall and spring semesters and the following summer session. A semester normally is about sixteen weeks long. The summer session comprises a first term (f) and a second term (s) each six weeks in duration; work also is offered on a nine-week basis (n) and a whole-session or twelve-week basis (w). The same academic credit is given for a course whether it is taken in the long session or the summer session.

ACADEMIC CREDIT: The unit of measure for academic credit is the semester hour. Most courses meet three hours a week in the long-session semester and have a credit value of three semester hours. The same courses meet for seven and one-half hours a week in a six-week summer term and have a credit value of three semester hours. For students enrolled in graduate programs, GPA hours and hours-passed reflect only those graduate-level courses (excluding thesis, dissertation, report, and treatise) and certain in-residence upper-division undergraduate courses taken while the student was enrolled in the Graduate School. Upper-division undergraduate courses taken in the fall of 1999 through the summer session of 2008 are not included.

COURSE NUMBERING SYSTEM: Courses are designated by a three-digit number or a three-digit number with a capital letter affixed. The first digit in the course number indicates the value of the course: 001-099 indicates zero credit value; 101-199 indicates one semester hour credit; 201-299 indicates two semester hours credit; 301-399 indicates three semester hours credit; and so on. The last two digits indicate the rank of the course: 01-19 indicates lower-division rank; 20-79 indicates upper-division rank; and 80-99 indicates graduate rank.

All courses in the School of Law and some courses in the College of Pharmacy are considered professional rank.

Two courses with the same abbreviation and the same last two digits may not both be counted for credit by a student unless the two digits are followed by a capital letter. Some courses may be repeated for credit. Those courses are indicated in the University's catalogs.

PREFIXES AND SUFFIXES: The suffix letters A, B, and X, Y, Z indicate that a part of the course was given. A suffix of A or B divides the course into two parts; X, Y, or Z divides the course into three parts. In each case, the semester-hour credit given for the course is reduced accordingly.

The prefix letters f, s, n, and w indicate the terms of the summer session (see above) in which the course was offered: f indicates first term; s indicates second term; n indicates nine-week session; and w indicates whole session.

For grading systems used prior to 1979, contact the Office of the Registrar.

GRADE		GRADE PTS PER SEM HR
	1979-1980 through 2004-2005	
A	EXCELLENT	4
B	ABOVE AVERAGE	3
C	AVERAGE	2
D	PASS	1
F	FAILURE	0
I	PERMANENT INCOMPLETE (effective fall 1997)	na[1]
X	TEMPORARY DELAY OF FINAL COURSE GRADE	na[1]
CR	CREDIT	na[1]
NC	NO CREDIT	na[1]
*	COURSE IS CONTINUING	na[1]
Q	OFFICIALLY DROPPED THE COURSE	na[1]
W	OFFICIALLY WITHDREW FROM THE UNIVERSITY	na[1]
#	COURSE GRADE NOT REPORTED BY FACULTY	na[1]
S	SATISFACTORY (DEV courses only)	na[1]
U	UNSATISFACTORY (DEV courses only)	na[1]
	2005-2006 to the present	
A	EXCELLENT[3]	4.00
A-		3.67
B+		3.33
B	ABOVE AVERAGE[3]	3.00
B-		2.67
C+		2.33
C	AVERAGE[3]	2.00
C-		1.67
D+		1.33
D		1.00
D-	PASS[3]	0.67
F	FAILURE[3]	0.00
I	PERMANENT INCOMPLETE	na[1]
X	TEMPORARY DELAY OF FINAL COURSE GRADE	na[1]
CR	CREDIT	na[1]
NC	NO CREDIT	na[1]
*	COURSE IS CONTINUING	na[1]
Q	OFFICIALLY DROPPED THE COURSE	na[1]
W	OFFICIALLY WITHDREW FROM THE UNIVERSITY	na[1]
#	COURSE GRADE NOT REPORTED BY FACULTY	na[1]
S	SATISFACTORY (DEV courses only)	na[1]
U	UNSATISFACTORY (DEV courses only)	na[1]

Through the summer session of 2009, plus and minus grades are reserved for graduate, graduate business, and law students enrolled in graduate-level, non-law courses. Beginning fall of 2009, plus and minus grades are valid for all students.

A course dropped by the twelfth class day of a long-session semester (fourth class day of a summer session term) is not entered on the permanent academic record.
Prior to fall 1981, NC grades did not appear on the transcript.

SCHOOL OF LAW

Prior to 1990-1991

The School of Law employed a numeric grading system with the following alpha equivalents:

85 - 100 = A
75 - 84 = B
65 - 74 = C
60 - 64 = D
BELOW 60 = F

1990-1991 - Present

Letter Grade	Grade Points Per Sem Hr.[2]
A+	4.3
A	4.0
A-	3.7
B+	3.3
B	3.0
B-	2.7
C+	2.3
C	2.0
D	1.7
F	1.3

1. na = not applicable to gpa calculation
2. Official grade point averages are not calculated for students in the School of Law.
3. Grade interpretation is applicable to undergraduate students.

NRTRP2 09/01/2009

Dear Judge,

I am writing this letter with the highest of enthusiasm in support of the application of Rosemary Ardman, who is seeking a clerkship in your chambers. Rosemary is one of the best students that I have taught in my over twenty-five years as a law professor. She is an incisive and creative thinker, her analytic and communication skills are outstanding, and she is exceptionally motivated and personable – qualities that I believe, would make an outstanding judicial clerk.

I met Rosemary in Spring 2022, when she was a first-year evening student in my Torts class at the University of Maryland Carey School of Law. She has also taken two additional courses with me, and I have gotten to know her a bit outside of the classroom.

Rosemary stood out early in the Torts class as an exceptionally bright student performing impressively in all aspects of the course. She received the highest grade for class participation, was consistently well prepared and able to answer any question I put to her. Also, her performance on the exam was exceptional, leading her to receive the highest grade in the class – A+.

This past fall (2022), Rosemary was a student in a course I co-taught, entitled "Environmental Justice, Human Rights and Public Health." The course is innovative in that half of the students are from the University of Maryland Carey School of Law and half from Chancellor College at the University of Malawi, where they are starting an Environmental Law Clinic. There were 14 students in the class last fall. Students at Maryland participated together in a classroom, but everyone was also on Zoom in order that students from Malawi could participate. Lecturers were from Maryland faculty as well as faculty, judges and legal practitioners from Malawi and South Africa. Again, Rosemary stood out among the students. She was always prepared and asked astute and interesting questions of the speakers. Her intellectual curiosity stood out among all the students. For their final projects, the students from Maryland and Malawi worked in teams to address an environmental, human rights and/or public health problem facing Malawi. The students drafted papers recommending legal strategies to accomplish stated goals on various issues including deforestation, air degradation from cook-top stoves, sewage pollution from non-functioning sewage treatment plants, and pollution of a river used by area residents for bathing and cleaning. Rosemary's group did a stellar job on their paper and Rosemary received an A for the course. It was the consensus of all three faculty for the seminar that Rosemary was an exceptional student.

In addition to the fall 2022 course, Rosemary was a student this past Spring semester (2023) in my Comparative Health Law seminar, which has 14 law students and four medical students. Again, Rosemary was a standout student in terms of class participation. I counted on her as the law student in the class who could explain Tort, Constitutional and other legal concepts to the medical students in the class. She has a good grasp of the law and is able to explain it clearly to students who lack a legal background. Rosemary's seminar paper, Mental Illness and Medical Aid in Dying: A Comparative Legal Analysis of Assisted Dying for Psychiatric Patients in Belgium, Canada, Switzerland, and the United States, was hands down the best paper in the class. She did an exemplary job describing the law and its history in each country on whether to permit individuals with a mental illness to participate in physician assisted dying. Further, she critically evaluated the strengths and weaknesses of each country's approach to the contentious issue, scrutinized the case law on the topic and identified gaps in legal reasoning as well as the implications of permitting individuals with mental illness to take advantage of this "service." She is a strong and persuasive writer and received the highest grade in the class on her paper as well as for the Seminar as a whole, i.e., an A+.

Rosemary's intellectual curiosity and capacity has not only impressed me but also other members of the faculty who have had her as a student. She is one of those students that faculty discuss because they are so impressed with their intellectual capacity. Last semester I was a member of our Appointments Committee, and we brought in numerous candidates who we were considering in the hiring process. As part of that process, we ask a handful of students to meet with each candidate. When we were looking for students to meet with one candidate, I immediately thought of Rosemary as I knew she would have no problem engaging with the candidate in a sophisticated manner, asking her not only about her teaching style and rapport with students, but also about her research and scholarship. She did not disappoint. In fact, she read the job talk paper of the candidate in advance of meeting with her and asked her probing questions about it.

I believe Rosemary's success in law school thus far reflects the exceptional potential that she has demonstrated in my classes. In addition to her high standing in her law school class she was recently elected editor of the Maryland Law Review. Rosemary's work at the ACLU, her internships at the public defender's office and the Juvenile Division of the Baltimore City Circuit Court also indicate a serious intent to pursue a career in law. She is a motivated and disciplined student who will without a doubt be a successful advocate.

I also believe that Rosemary has both the dedication and the intellectual acumen to be an outstanding judicial clerk. She is not only one of the brightest students that I have taught, she is one of the most collegial and personable and no doubt would be an asset to your chambers. I therefore recommend her highly and without reservation to be your judicial clerk.

Please do not hesitate to contact me if there is any further information that I can provide.

Sincerely,

Diane E. Hoffmann
Jacob A. France Professor of Health Law
Distinguished University Professor

Diane Hoffmann - dhoffmann@law.umaryland.edu - (410) 706-7191

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to enthusiastically recommend Rosemary Ardman—recently elected Editor-in-Chief of the Maryland Law Review—for a judicial clerkship in your chambers. Rosemary currently maintains a 4.15 GPA, an impressive feat made possible by earning the coveted A+ top grades. Even more impressive, though, she has accomplished these credentials while working full-time at the ACLU Maryland. Her ability to balance these two particularly challenging tasks side-by-side shows her brilliance and ability to manage competing responsibilities. In addition, she is, quite simply, one of the most generous and engaging law students in our community.

Rosemary easily possesses the writing, analytical, and leadership skills to succeed in a clerkship. I have gotten to know her well over the past two+ years, in two capacities. First, she was the No. 2 student in my Civil Procedure class during Fall 2021, which took place online due to the coronavirus and in which she missed the top spot by the thinnest of hairs. She was always prepared, made thoughtful contributions to our classroom conversations, and demonstrated her facility with analytical puzzles and difficult doctrines. Second, I have worked closely with Rosemary over the past two years as a legal writing fellow in our student fellows program, which I supervise. She has always been willing to pitch in to solve every exigency—a student seeking writing support during the middle of the exam period at a professor's urging, for example—and maintains a genuine predisposition toward helping others.

Rosemary also has a very personal and compelling backstory that forced her to develop self-sufficiency at a very young age. Suffice it to say that she has thrived and succeeded against daunting odds.

Despite this, and as suggested above, Rosemary radiates an engaging and warm nature that make her an ideal candidate for sharing the close quarters of a judicial chambers. I am always glad to see her in the halls and feel invested in her success for her commitment to being not only the best law student, but also the best community supporter she can be.

I hope you will consider Rosemary for a clerkship in your chambers, for which I recommend her whole-heartedly. Please contact me if you have any questions.

Sincerely,

Anne-Marie Carstens
Director of Lawyering & Law School Assistant Professor

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am honored to recommend Ms. Rosemary Ardman for a federal or state judicial clerkship. Excellence Scholarship. Ms. Ardman was a student in the Constitutional Law sequence that I taught at the University of Maryland Carey School of Law during the 2021-22 academic year. She was also a student in the joint Maryland/Galway Comparative Constitutional Democracy I taught in Ireland with Professors Ioanna Tourkochoriti and Peter Danchin. Ms. Ardman's performance in the Constitutional Law sequence was spectacular. She earned an A+ in both Constitutional Law I (Governance, Fall 2021) and in Constitutional Law II (Rights, Spring 2022). She had the highest examination grade in the fall semester and in the spring semester. This is the best two semester performance of any student I have taught in twenty years at the law school. Ms. Ardman exhibited the same high standards in Ireland. Although the class was graded pass-fail, she demonstrated preparation and acumen equal to many of the younger scholars who presented in the class. Ms. Ardman is not simply the strongest student I will be recommending this year; she is high in the top-five of any student I have ever recommended for a clerkship.

Ms. Ardman was a star in both Constitutional Law I and Constitutional Law II, even before the examination. Her attendance was perfect in mind and body. Every class she sat in the fifth row, left hand side (from my perspective, from her perspective, she was on the right-hand side). Evening classes at Maryland are often quite talkative, and the 2021-22 class was no exception. Even when we were on Zoom, Ms. Ardman consistently volunteered in class. She was particularly active and articulate when women's issues were raised. She is a committed supporter of abortion rights and comparative worth. Nevertheless, Ms. Ardman was happy to share her opinions on issues as diverse as whether Wayfair could escape South Dakota's sales tax (dormant commerce clause) and when environmental regulations are inconsistent with the commerce clause. She was one of the most respected voices in the class. Ms. Ardman was as poised and intelligent when called upon in class. I use an expert system. Students are notified beforehand that they are expected to be experts on at least three cases each semester. We then have an approximately fifteenth minute discussion on case facts, case theories, case holdings and case consequences. Ms. Ardman was excellent in all of these dimensions. She could explain case facts to a person who had no clue who the parties were, detailed the legal strategies both sides used, discussed the central themes in all opinions, and give her views on whether the case was rightly decided. Her summaries were crisp and to the point. Her arguments were persuasive without being polemical.

Ms. Ardman's final examinations did not disappoint, to say the least. My final examinations consist of three parts. The first is a multiple choice, which frankly is designed to ensure that anyone who did the reading passes the course. I think Ms. Ardman got no more than 2-3 questions wrong out of 60. The second is the classic law school issue spot. I give students a hypothetical and ask them to identify possible constitutional violations. Ms. Ardman had no problem identifying the correct clauses, correct precedents, and correct tests. I threw a few tricks at the students (burying, for example, a state action problem in a free speech case). Ms. Ardman saw through me. Hers were the rare examinations that saw every issue. I suspect most of the very minor deductions reflected my desire to find some excuse to take off points somewhere. Ms. Ardman really shone on the take home portion of the class. On this part, I ask students to be advocates, making the strongest arguments for their positions. In the spring, I asked students that on the assumption that Dred Scott was wrongly decided, Lochner was wrongly decided, and Brown was rightly decided, should the Supreme Court overrule Roe v. Wade (by coincidence the final occurred the day the draft opinion leaked). Ms. Ardman penned a terrific essay. She pointed out that Taney claimed to be an originalist, so one should not use originalism to resolve fundamental rights problems, that personal rights at stake in abortion cases differed from the economic rights at stake in Lochner, and that Brown properly understood was about dismantling status hierarchies. In short, the cases everyone in the legal profession agrees were wrongly decided and those the profession agrees are rightly decided, all involved principles that Ms. Ardman maintained justified keeping abortion legal. The essay was well-organized and demonstrated a powerful grasp of how lawyers use canonical and anti-canonical cases in the past to advance their present causes.

Ms. Ardman really shone in the Ireland program. Students were expected to participate in a professional conference on the comparative law of religion and anti-discrimination law, then attend and comment on a number of faculty presentations. No one not looking at the name tags would know that Ms. Ardman was a student and not an assistant professor. She came to each presentation prepared to discuss some fairly complex papers. She developed a nuanced understanding of the problems of protecting both religion and minorities. I particularly remember her comments on the Jewish Day School case in the United Kingdom. The Jewish Day School is a very elite private school that insists Jews either have Jewish mothers or have a conversion ceremony. Ms. Ardman noted that this was discrimination based on birth, that the Jewish Day School received considerable state benefits, so could not so discriminate, even though the school accepted under different standards non-Jewish standards. Her ability to navigate the differences between discrimination law in the United States and the United Kingdom was superb, as was her sensitivity to all sides of the issues. As noted in a previous paragraph, Ms. Ardman has opinions and holds many of them strongly, but she is able to articulate them professionally in ways that show respect for all persons. Many scholars credited Ms. Ardman's comments with improving papers they will be publishing in a forthcoming academic volume.

I have reviewed Ms. Ardman's record and writings before writing this letter, and both are nothing short of amazing. Her GPA at Maryland Carey is not only close to perfect, but she has had the highest grades in at least half the classes she has taken. Her student note on the Larry Nassar hearings would be a plus on the tenure file of a faculty member. Ms. Ardman explores the role of

the testimony of childhood sexual abuse in the sentencing of a doctor who abused one girl after another as team physician for USA Gymnastics. The paper is sophisticated on law, philosophy, and psychology. Ms. Ardman recognized the powerful effect of testimony of the victims of Nassar's abuse, but she points out that the focus on Nassar's abuse shone the spotlight exclusively on Nassar and not on the numerous social conditions that should have been known that might have ended the abuse earlier. Everyone's desire for medals had powerful effects shutting people's eyes to what should have been obvious. As long as Americans continue to emphasize winning Olympic goal, abusive relationships in women's sports are likely to continue. This is a paper that merits a very wide audience for the conclusion, for the painstaking research that supported the conclusion, and for the excellent writing.

In short, Ms. Ardman is one of the strongest and possibly the strongest candidate Maryland Carey Law has had for a clerkship in a very long time. I cannot recall a single student who got the highest grade in both of my classes, not to mention the highest grade in about eight other classes. Ms. Ardman has done this while holding down a full-time job, being active in the Maryland Public Interest Community, and writing a superb law review note. She is now the incoming editor of the Maryland Law Review. She has all the attributes of a successful clerk. She manages time well. She expresses herself clearly in speech and writing. She can grasp and explain sophisticated concepts to the unwashed. As important, she is a charming individual. She was a delight to work with. For all these reasons and many more, Ms. Ardman has the strongest recommendation I can give for a federal or state judicial clerkship.

If there is any more information you need about this outstanding young lawyer in the making, I can be reached at the University of Maryland Carey School of Law (500 W. Baltimore Street, Baltimore, MD 20201), at 410-706-2767 or at mgraber@law.umaryland.edu. Thank you for your kind consideration.

Yours truly,

Mark A. Graber
Regents Professor
UM Carey School of Law

Rosemary Ardman
1300 Saint Paul St. #5, Baltimore, MD 21202
rardman@umaryland.edu | 512-815-6058

Writing Sample #1

The following writing sample is a portion of an internal memorandum written for a summer internship with the Federal Public Defender for the District of Maryland. Our client was convicted of drug trafficking conspiracy for transporting large quantities of marijuana. He initially retained the services of a lawyer known for publicity stunts, and his counsel advised him to reject a generous plea offer in favor of a jury trial, which counsel was confident would result in acquittal due to the popularity of marijuana legalization. Our client was convicted at trial and received a lengthy prison sentence. Our office took over his case and sought a new trial, arguing our client's previous attorney performed deficiently under the Sixth Amendment. In the following memorandum, I set out the best strategy for asserting that our client received ineffective assistance of counsel during plea negotiations. The work is entirely my own with no editing from others.

Analysis

The Sixth Amendment guarantees criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To provide proficient representation, counsel must perform "within the range of competence demanded of attorneys in criminal cases." *Strickland*, 466 U.S. at 687-88 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Though the Court has not set out specific guidelines, an attorney's conduct must accord with prevailing professional norms during all critical phases of the proceedings, including plea negotiations. *Missouri v. Frye*, 566 U.S. 134, 140 (2012); *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). To successfully raise an ineffective assistance of counsel claim, *Strickland* sets out a two-pronged standard. 466 U.S. at 687. A defendant must show, first, that counsel performed deficiently and, second, that this prejudiced the case's outcome. *Id.*

I. CLIENT's Sixth Amendment right to effective counsel was violated by his attorney's unreasonable advice during plea negotiations, which led CLIENT to reject a plea offer far less severe than the sentence range he now faces.

CLIENT's previous attorney's failure to reasonably advise him regarding the plea deal constitutes deficient performance under the Sixth Amendment, and this prejudiced the outcome of his case because CLIENT would have otherwise accepted the plea and now faces a significantly longer sentence. Counsel's obligation to perform proficiently applies not only at trial, but during "all 'critical' stages of the criminal proceedings," particularly pretrial plea negotiations. *Frye*, 566 U.S. at 140 (quoting *Montejo v. Louisiana*, 566 U.S. 778, 786 (2009)). As the Supreme Court articulated in *Lafler*, "[C]riminal justice today is for the most part a system of pleas, not a system of trials." 566 U.S. at 170. With ninety-seven percent of federal convictions resulting from guilty pleas, "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing

convictions and determining sentences." *Id.*; *see Frye*, 566 U.S. at 143-44. When advice by counsel leads a client to reject a plea offer, the *Strickland* test for ineffective assistance requires demonstrating, first, that the advice fell below a reasonable professional standard and, second, that the defendant would have received a better outcome had he accepted the plea. *See Lafler*, 566 U.S. at 174.

A. CLIENT's counsel performed deficiently by misunderstanding fundamental legal issues, making unreasonable predictions about trial outcomes, and giving contradictory advice.

CLIENT's counsel's strategy rested on a deep misunderstanding of Maryland constitutional law and an absurd faith that a jury would nullify CLIENT's verdict due to the popularity of marijuana legalization. To deliver constitutionally sufficient assistance, an attorney must "provide . . . competent and fully informed advice, including an analysis of the risks that the client would face in proceeding to trial." *Burt v. Titlow*, 571 U.S. 12, 25 (2013) (Sotomayor, J., concurring). While courts generally presume that an attorney performed acceptably, the lack of basic competence regarding legal analysis and advice constitutes defective representation. *Dodson v. Ballard*, 800 F. App'x 171, 177 (4th Cir. 2020). For example, counsel's failure to perform relevant research, raise important issues, or generally demonstrate "legal competence" deprives a client of the right to counsel. *United States v. Carthorne*, 878 F.3d 456, 466 (4th Cir. 2017). Lawyers may reasonably pursue a variety of strategies, but courts' deference to attorneys' tactics does not apply when a decision "made no sense or was unreasonable." *Id.* at 467 (citing *Vinson v. True*, 43656 F.3d 412, 419 (4th Cir. 2006)). Likewise, though an erroneous prediction alone is not ineffective assistance, patently unrealistic advice about likely trial outcomes violates a defendant's Sixth Amendment rights. *See Steele v. United States*, 321 F. Supp. 3d 584, 590 (D. Md. 2018) (finding that counsel's inaccurate advice to defendant "as to the realities of the

sentence he faced or the odds stacked against him" was ineffective assistance); *United States v. Stockton*, No. MJG-99-0352, 2012 WL 2675240, at *11-12 (D. Md. July 5, 2012) (stating that counsel must not advise a client to reject an offer based on the "manifestly erroneous" opinion that the client will not be convicted at trial).

Unreasonable advice during plea negotiations meets the defective performance prong of the *Strickland* standard. *Lafler*, 566 U.S. at 174. Advice based on a misunderstanding of the law is the quintessential example of such a deficiency. *United States v. Freeman*, 24 F.4th 320, 326 (4th Cir. 2022) (en banc). In *Dodson*, the defendant faced a potential life sentence for felony burglary and misdemeanor domestic battery, and he received an offer to plead guilty in exchange for a recommended sentence of two to eleven years. 800 F. App'x at 173. Counsel mistakenly believed that the burglary charge included a "breaking" element and advised the defendant to reject the plea because no breaking had occurred. *Id.* at 174-75. The Fourth Circuit found that this "deficient advice" and "lack of knowledge of the pertinent law" was a constitutionally defective performance. *Id.* at 180. Similarly, in *Lafler*, all parties conceded that counsel was deficient when the defendant's lawyer told him that he could not be convicted of attempted murder because he had only shot the victim below the waist. 566 U.S. at 161, 163. And in *United States v. Swaby*, an attorney's failure to realize that his client would be deported if he accepted a plea deal—a mistake that occurred because the attorney read an old version of the relevant statute—constituted ineffective representation. 855 F.3d 233, 240 (4th Cir. 2017).

Beyond explicit legal mistakes, an attorney's inaccurate predictions can constitute defective performance if sufficiently unreasonable. *See United States v. Mayhew*, 995 F.3d 171, 177-78 (4th Cir. 2021); *Steele*, 321 F. Supp. 3d at 588-90. In *Mayhew*, a lawyer's alleged assurances that the defendant would only receive a two-to-five-year sentence if he went to trial

breached the defendant's right to effective counsel when the defendant in fact received a sentence of twenty-six years and had faced a maximum sentence of even longer. 995 F.3d at 177-78. Likewise, in *Steele*, an attorney advised her client to reject an eight-to-ten-year plea deal in a drug conspiracy case because she unreasonably expected the success of a motion to suppress evidence and inaccurately believed that this issue could not be preserved for appeal if the client pled guilty. 321 F. Supp. 3d at 588-90. The District Court for the District of Maryland found that, "[Counsel] was overly confident in her ability to secure an acquittal . . . . She did not accurately manage her client's expectations, and she failed to remediate the obvious deficiencies in her familiarity with this jurisdiction and defense advocacy generally." *Id.* at 589. Further, though the client initially suggested he would only accept a plea for less than eight years, he eventually "begged his attorney to obtain a plea offer for him," which she failed to do. *Id.* at 592. The court found that "her failures to properly advise him throughout the critical pretrial stages, to adequately engage in the plea bargaining process, and to obtain a plea offer when her client pleaded for one" rendered her performance defective. *Id.* at 593.

In the present case, CLIENT's previous counsel provided advice that ranged from unrealistic to plainly incorrect. His legal strategy rested almost entirely on jury nullification, and his belief in the likely success of this approach stemmed partly from a mistake regarding state constitutional law. In a call in late February, about two weeks after CLIENT rejected a six-year plea, his then-attorney asserted that the Maryland Constitution gives the jury the power "to judge whether a law is just" and described this as "a real footing for the type of thing we're going to be doing at trial." *See* Call on 2/25/21. This is true in a sense: The Constitution of Maryland states that "the Jury shall be the Judges of Law, as well as of fact." Md. Const. Decl. of Rts. art. 23. However, a series of court cases beginning in the 1980 rejected the plain meaning of Article 23

and held that all but a few, limited legal questions "are for the judge alone to decide." *Unger v. State*, 48 A.3d 242, 244-45 (Md. 2012) (citations omitted). Jury instructions based on Article 23—which had stated that the jury was the judge of the law and all other instructions were "advisory-only—were ultimately found unconstitutional. *Id.* at 417. Counsel's understanding of the jury's authority was therefore completely incorrect, a legal mistake of the kind and degree that made counsel's performance defective in *Dodson* and *Swaby*. Though it is unclear to what extent this informed counsel's strategy—he appears to have only mentioned it after CLIENT rejected the plea deal—the error exemplifies his professional incompetence regarding federal criminal defense and falls well outside the range of constitutionally permissible advice.

Moreover, apart from this misunderstanding of the law, CLIENT's attorney provided unreasonable advice throughout the pretrial stage based on his unjustifiable belief that a jury would not convict CLIENT because of the popularity of marijuana legalization. Though CLIENT faced a ten-year mandatory minimum and maximum sentence of life in prison, his attorney even advised him that he would receive a better outcome by getting convicted at trial than accepting the government's plea offer, which began at eight years and was eventually reduced to six. *See* Call on 10/13/20 ("It's hard for me to see, even worst case scenario, them getting even near the eight they're asking you to plea to."); Call on 5/28/21 ("You're not going to get 15 years. That's not going to happen, just so you know."). While he did say at times that the government's final six-year offer was "good," he also continued counseling CLIENT that likely changes to federal drug law and the probability of jury nullification made a trial the best option. *See* Calls from 12/29/21 to 2/16/22.

In some ways, this erratic advice is less obviously defective than counsel's mistake regarding the jury's legal authority. In other respects, however, this guidance is just as

egregiously incompetent. Despite understanding the elements of the charge, extent of the incriminating evidence, and CLIENT's sentence exposure, his attorney continued to baselessly insist that CLIENT would get the best results by going to trial. Like the attorney in *Steele*, whose absurd conviction in her ability to suppress key evidence led her client to reject a guilty plea, counsel's confidence in a favorable trial outcome was untethered from both fact and legal doctrine. That this opinion rested on the belief that he could convince a jury to not follow the law makes the strategy even more alarmingly deficient. If he at times vacillated and warned CLIENT that he risked a longer sentence at trial, *see* Call on 12/3/21, this contradictory advise only exacerbates his failure to provide the "competent . . . fully informed advice" about the merits of the plea deal, which the Constitution requires. *Burt*, 571 U.S. at 25 (Sotomayor, J., concurring). Though ineffective assistance claims have not previously been based on inconsistent advice, the absence of such cases further highlights counsel's blatant—and at times bizarre—incompetence in handling CLIENT's case. In short, CLIENT was deprived of the reasonable assistance guaranteed by the Sixth Amendment.

B. CLIENT's testimony that he would have pled guilty if not for counsel's advice, his history of deferring to counsel, and the objective benefits of the plea demonstrate that he was prejudiced by counsel's deficient performance.

The second prong of the *Strickland* standard requires the defendant to establish that the attorney's deficient performance prejudiced the outcome of the case. 466 U.S. at 687. This requires a "reasonable probability"—in other words, "a probability sufficient to undermine confidence in the outcome"—that the result of the proceedings would have been different but for counsel's errors. *Id.* at 694. In the context of a rejected plea deal, the defendant must demonstrate the reasonable probability that he would have entered a plea deal with less severe terms than the ultimate sentence. *Lafler*, 566 U.S. at 164. Additionally, the defendant must show that the

prosecution would not have withdrawn the offer, and the court would have accepted its terms. *Lafler*, 566 U.S. at 164; *Frye*, 566 U.S. at 147. However, informative statements by the court or government—for instance, the terms of a plea agreement itself—do not mitigate the prejudice of counsel's deficiency unless the defendant actually understood the issue at hand. *United States v. Crawford*, No. GJH-15-322, 2021 WL 1662471, at *9 (D. Md. Apr. 28, 2021).

A defendant can show that the prosecution and court would have followed through with the plea based on the "the boundaries of acceptable plea bargains and sentence" in the jurisdiction. *Fyre*, 566 U.S. at 149. "[I]n most instances, it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain." *Id.* For this reason, disputes over the prejudice prong usually hinge on whether the defendant would have otherwise accepted the plea. Evidence to this point includes a defendant's own testimony, his previous statements expressing an interest in pleading guilty, a history of accepting plea deals, a history of following his attorney's advice, and the general circumstances of the plea offer—for instance if it would have resulted in a far lower sentence. *See Cooper v. Lafler*, 376 F. App'x 563, 571-72 (6th Cir. 2010), vacated on other grounds, 556 U.S. 156 (2012); *Dodson*, 800 F. App'x at 180-81; *see also Swaby*, 955 F.3d at 243-44 (finding that defendant's strong familial ties to the United States indicated that he would have rejected a guilty plea that resulted in his deportation had he been properly advised).

A defendant's testimony can provide strong evidence of prejudice. In *Lafler*, the Supreme Court recognized that the defendant met the *Strickland* prejudiced prong based largely on the defendant's uncontradicted testimony that he would have taken the plea if not for his lawyer's incorrect advice about the possibility of a conviction at trial. 566 U.S. at 174. Additionally, his

lawyer confirmed he was open to a plea agreement, and the disparity between the rejected plea and his sentence exposure after trial further substantiated the defendant's testimony. *Id.* The government pointed to evidence that the defendant had wanted a plea deal with an even lesser sentence as indication that he would not have accepted the actual plea offer, but the court found that this actually corroborated his position by further indicating his desire to avoid a trial. *Id.* The court also rejected the government's argument that the defendant never expressed desire to plead guilty during pretrial conferences, concluding that this lack of interest stemmed from his counsel's incorrect advice. *Id.* Similarly, in *Dodson*, the defendant's testimony, history of accepting guilty pleas and generally relying on the advice of counsel, and the plea's objective benefits sufficed to establish prejudice. 800 F. App'x at 180-81. However, a defendant's testimony alone can be insufficient if his conduct does not suggest he would have accepted the plea. *See Merzbacher v. Shearin*, 706 F.3d 356, 366-67 (4th Cir. 2013) (finding that the state court was not unreasonable to conclude that the defendant's insistence on his innocence showed he would not have taken a guilty plea).

For CLIENT, his own testimony that he would have taken the plea but for counsel's advice provides substantial evidence of prejudice. This is corroborated by phone calls indicating that he was poised to take the plea until his attorney began reemphasizing the merits of going to trial. *See* Calls on 12/29/21, 2/11/21. Additionally, as in *Lafler* and *Dodson*, the disparity between the sentence offered in the plea—six years—and the sentence he now phases—ten years to life—substantiate this testimony; the fact that any rational person would have taken such a plea is itself evidence of prejudice. Further, like the defendant in *Dodson*, CLIENT has a history of following his counsel's advice. Upon deciding to reject the plea deal, he stated "I'm going into this completely on faith of my attorney." Call on 2/17/22. At counsel's suggestion, he hired a

series of public relations firms to publicize his case, part of counsel's misguided strategy to leverage the popularity of marijuana into a case dismissal or jury nullification. *See* Calls 5/12/21, 5/18/21. Moreover, this was against CLIENT's better judgement; he stated his frustration with "influencer" culture and worried it was a pointless tactic but changed his mind when counsel said it was best for his case—further indication of his deference to his counsel's advice. *See* Calls on 5/21/21, 5/24/21. Though CLIENT at times expressed antagonism to the idea of pleading guilty and cooperating with the government, this position is bound up with his attorney's near-daily statements that he would be heroic to go to trial and shine light on the injustice of marijuana criminalization. Like the defendant in *Lafner*, any disinterest CLIENT showed toward a plea deal was itself the result of counsel's deficiencies. In short, the evidence persuasively demonstrates that CLIENT would have accepted the plea but for his counsel's deficient performance.

The evidence also shows that the government would not have withdrawn the deal, and the court would have accepted it. CLIENT's many other co-defendants received similar plea offers, none of which were retracted by the government or rejected by the court. Further, the plea would have reasonably imposed a six-year sentence for a first-time, nonviolent drug offense. Due to CLIENT's safety-valve eligibility, this was well within the boundaries of acceptable plea agreements for such an offense. An objective assessment thus establishes that the government and court would have finalized the plea had CLIENT accepted it. This, together with the objective benefits of the plea deal, his history of following counsel's advice, and his corroborated testimony demonstrate that CLIENT was prejudiced by his counsel's deficient performance.

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Writing Sample #2

The following writing sample is a portion of an internal memorandum written for a summer internship with the Federal Public Defender for the District of Maryland. Our client was the former CEO of a nonprofit utility provider. He allegedly participated in a kick-back scheme with a subcontractor and was charged with bribery and related offenses under 18 U.S.C. § 666. The following memorandum excerpt analyzes (1) whether the statute requires intent to engage in a quid pro quo and (2) whether the client is a "public official" for purposes of sentencing enhancement under the U.S. Sentencing Guidelines. All identifying information is redacted. The work is entirely my own without any editing from others.

Analysis

CLIENT allegedly violated 18 U.S.C. § 666, which applies when an agent of an organization that receives federal funding "corruptly solicits . . . or agrees to accept anything of value . . . intending to be influenced or rewarded in connection with any . . . transaction [worth at least $5,000]." 18 U.S.C. § 666(a)(1)(B). In punishing corrupt conduct, criminal law has historically distinguished between bribes and illegal gratuities, with the former a more serious offense that requires intent to enter a quid pro quo arrangement. Stephanie G. VanHorn, *Taming the Beast: Why Courts Should Not Interpret 18 U.S.C. § 666 to Criminalize Gratuities*, 119 Penn St. L. Rev. 301, 302 (2014). As the Fourth Circuit Court of Appeals explained in *United States v. Jennings*, bribery requires that the defendant acted with the "'corrupt intent' . . . to receive a specific benefit in return for payment"—in other words, "to engage in 'some more or less specific quid pro quo.'" 160 F.3d 1006, 1013 (4th Cir. 1998) (quoting *United States v. Duvall*, 846 F.2d 966, 972 (5th Cir. 1988)). An illegal gratuity, in contrast, "is a payment made to an official concerning a specific official act (or omission) that the payor expected to occur in any event"—more than "a good will gift" but less than a quid pro quo. *Id.* However, § 666 was enacted with broader language than the previous bribery statute, without an obvious distinction between bribes and illegal gratuities. *Id.* at 1019. Courts have divided on whether the quid pro quo requirement still applies, and the question is unresolved in the Fourth Circuit. *United States v. Vaughn*, 815 F. App'x 721, 728 (4th Cir. 2020).

I. Circuits are split on whether 18 U.S.C. § 666 criminalizes gratuities in addition to bribes, and the Fourth Circuit has not decided the issue.

Historically, illegal gratuities have been classified as a less serious offense than bribes due to the absence of a quid pro quo. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999). As the Supreme Court explained:

> [F]or bribery there must be a quid pro quo—a specific intent to give or receive something of value in exchange for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take . . . or for a past act that he has already taken. The punishments prescribed for the two offenses reflect their relative seriousness.

Id. However, the language of § 666—"intending to be *influenced or rewarded*"—does not explicitly make this distinction. 18 U.S.C. § 666(a)(1)(b) (emphasis added); *see* 18 U.S.C. 201(b)-(c) (distinguishing between bribes given "to influence" an official act, and gratuities given "for or because of" an official act). As of today, the Second, Seventh, and Eighth Circuits have found that § 666 extends to illegal gratuities, with no quid pro quo requirement. *United States v. Bonito*, 57 F.3d 167, 171 (2d Cir. 1995); *United States v. Agostino*, 132 F.3d 1193, 1190 (7th Cir. 1997); *United States v. Zimmerman*, 509 F.3d 920, 927 (8th Cir. 2007). The First Circuit, in contrast, applies § 666 only to bribes. *United States v. Fernandez*, 722 F.3d 1, 6 (1st Cir. 2013). In *Jennings*, the Fourth Circuit expressed concern about eliminating the bribery/gratuity distinction, but it has so far avoided resolving the matter. 160 F.3d at 1015; *see Vaughn*, 815 F. App'x at 728 (discussing the status of the bribery/gratuity distinction in the Fourth Circuit).

a. Historically, an illegal gratuity given in the absence of a quid pro quo agreement was a less severe offense than bribery.

Prior to the enacting of § 666 in 1984, an illegal gratuity was considered a lesser included offense in bribery under 18 U.S.C. § 201, the general bribery statute. *Jennings*, 160 F.3d at 1012, 1014. This reflects the principle that the "corrupt intent" required for bribery "is a 'different and higher' degree of criminal intent than that necessary for an illegal gratuity," where the payment relates to conduct the recipient was expected to perform no matter what. *Id.* at 104 (quoting *United States v. Brewster*, 506 F.2d 62, 72 (D.C. Cir. 1974)). For this reason, § 201 expressly distinguishes between a bribe "corruptly" accepted "in return for . . . being influenced,"

punishable by up to fifteen years in prison, and a gratuity accepted "for or because of any official act," punishable by up to two years in prison. 18 U.S.C § 201(b)(2), (c)(3).

In contrast, § 666 applies when an individual "corruptly" accepts payment while "intending to be influenced *or rewarded*." *Id.* § 666(a)(1)(B) (emphasis added). In other words, § 666 adopts the corrupt intent element of the § 201 bribery provision but extends it to situations where the recipient was "rewarded" rather than "influenced," making the statute's application to gratuities unclear. To exacerbate this ambiguity, the original version of the statute, enacted in 1984, criminalized gifts made "for or because of the recipients conduct," an even broader category of intent. Pub. L. No. 98-473, § 1104(c), 98 Stat. 1837, 2144 (1984). In dicta, the Fourth Circuit suggested that the current statutory language could have been adopted to intentionally limit § 666 to bribes, though other courts have rejected this interpretation. *See Jennings*, 160 F.3d at 1016 n.4 ("[A] court interpreting the statutory history of the 1986 amendment to § 666 could reach the conclusion . . . that the 1986 amendment to § 666 clarified that the statute prohibited only bribes."). *But see Bonito*, 57 F.3d at 171 ("Fatal to [defendant's] argument [that the updated statute prohibits only bribes], however, is the fact that the deleted language has been replaced with language that is to the same effect.").

b. The Fourth Circuit has not decided whether § 666 requires intent to engage in a quid pro quo.

The Fourth Circuit has twice declined to rule on the application of § 666 but has suggested that a quid pro quo element should apply. *Jennings*, 160 F.3d at 105; *Vaughn*, 815 F. App'x at 728. In *Jennings*, the defendant, a contractor who made illegal payments to a housing authority contractor, argued that the payments were gratuities rather than bribes and not prohibited under the statute. 160 F.3d at 1010-12. The court ultimately found that the payments were bribes, so it did not address the interpretation of § 666. *Id.* at 1015. However, the court

suggested that including gratuities within the statute would problematically "blur longstanding distinction between bribes and illegal gratuities." *Id.* at 1015 n.4. In a long footnote, the court criticized other circuits' decision to extend § 666 to gratuities and offered two potential justifications for excluding them. *Id*. First, a court could reasonably determine that "corruptly . . . with intent to influence or reward" resembles § 201's bribery provision, not the gratuity provision. *Id.* "Second, a court interpreting the statutory history of the 1986 amendment to § 666 could reach the conclusion . . . that the 1986 amendment to § 666 clarified that the statute prohibits only bribes." *Id.* Because the issue was unnecessary for the case's resolution the court "le[ft] the definitive interpretation . . . for another day." *Id.*

Two decades later, in *Vaughn*, the Fourth Circuit again deferred the question. 815 F. App'x at 728. Vaughn was a Maryland State Delegate who helped pass legislation permitting Sunday liquor sales in exchange for payments from liquor store owners. *Id.* at 723-26. He argued that the payments were gratuities rather than bribes because he would have voted for the bills regardless. *Id.* at 729. However, evidence indicated that even if he would have voted for "*some kind* of [Sunday sales] legislation," the payments still influenced the specific policies he supported. *Id.* (alteration in original). Again, because the evidence supported a bribery conviction, the court did not decide the gratuities issue, though it observed that most circuits apply § 666 to gratuities, with only the First Circuit limiting it to bribes. *Id.* Unlike in *Jennings*, the court did discuss other circuits' reasoning at length, but it noted, "A third possibility is that § 666 criminalizes bribery along with something less than bribery, but greater than a gratuity as defined under § 201." *Id.* This arguably suggests the Fourth Circuit remains open to limiting § 666, though the reasoning here further blurs the line between bribes and gratuities.

c. Only the First Circuit has found that § 666 applies exclusively to bribes.

The First Circuit alone has determined that § 666 does not include gratuities. *Fernandez*, 722 F.3d at 6. In *Fernandez*, the trial court instructed the jury that conviction under § 666 required the government to prove the existence of a quid pro quo, but it also instructed that the offer could take place *after* the conduct being rewarded. *Id.* at 17-18. On appeal, the defendants argued that an offer of a reward made after the conduct is a gratuity, not a bribe, and therefore not covered by the statute. *Id.* at 18-19. The First Circuit agreed. First, it determined that bribery occurs only if the offer is made beforehand, though payment itself can occur after the conduct. *Id.* at 20. Second, the court found that § 666 applies only to bribes, a conclusion based on the statute's use of "corruptly," its relationship with § 201, and the historically disparate penalties for bribes and illegal gratuities. *Id.* at 20-26. While most circuits have held that a gratuity falls within the provision as a "reward," the court explained that "the word 'reward' does not create a separate gratuity offense in § 666, but rather . . . merely clarifies 'that a bribe can be promised before but paid after, the official's action on the payor's behalf." *Id.* at 23 (citing *Jennings*, 160 F.3d at 1015 n.3). *Fernandez*'s analysis is far more extensive than that of cases from other circuits and provides a strong persuasive precedent for limiting the statute to bribes.

d. The Second, Eighth, and arguably Seventh extend § 666 to illegal gratuities.

The Second, Seventh, and Eighth Circuits have rejected a quid pro quo requirement and found that § 666 criminalizes both bribes and illegal gratuities. In *United States v. Crozier*, the Second Circuit Court of Appeals pointed to the "broad language" of an earlier version of § 666, which criminalized the offer of "anything of value *for or because of the recipient's conduct*," to justify including "both past acts supporting a gratuity theory and future acts necessary for a bribery theory." 987 F.2d 893, 898-99 (2d Cir. 1993). *Bonito*, a Second Circuit case concerning the current version of § 666, echoed this reasoning in concluding that payment "to influence or

reward" official conduct covers gratuities given with the intent to reward, "so long as the intent to reward is corrupt." 57 F.3d at 171. Likewise, in *Zimmerman*, the Eighth Circuit Court of Appeals rejected the defendant's argument that conviction required a quid pro quo, reasoning that "intending to be influenced or rewarded" means that the law applies both to "bribes and the acceptance of gratuities intended to be a bonus for taking official action." 509 F.3d at 927.

The Seventh Circuit has also rejected a quid pro quo element, though its case law is somewhat ambiguous. In *Agostino*, the court found that the government did not need to show a quid pro quo agreement when charging an individual based on the *offer* of a payment. 132 F.3d at 1190. However, the earlier case *United States v. Medley* potentially recognized a quid pro quo element when an individual was charged with *receiving* an illegal payment. 913 F.2d 1248, 1260-61 (7th Cir. 1990). In considering an appeal based on erroneous jury instructions—ultimately rejected—the court stated, "The essential element of a § 666 violation is a 'quid pro quo'; that is, whether the payment was accepted to influence and reward an official for an improper act." *Id.* at 1260. Confusingly, though, the court also remarked that bribes and gratuities "are both illegal under different parts of the statute," seeming to distinguish between them based on something other than the quid pro quo element. *Id.* Considering this language, the *Agostino* court stated that *Medley* "was not positing an additional element to the statutory definition of the crime, but instead was explaining the *sine qua non* of a violation of § 666." 132 F.3d at 1190. Because of this, and the fact that *Medley* concerned receiving rather than giving a bribe, *Agostino* "decline[d] to import an additional, specific *quid pro quo* requirement into the elements of § 666(a)(2)." *Id.*

II. "Public official" includes individuals in positions of public trust with responsibility for carrying out government policies and programs.

The United States Sentencing Guidelines enhance the sentence of individuals convicted under 18 U.S.C. § 666 "if the defendant was a public official." U.S. SENT'G GUIDELINES MANUAL § 2C1.1(A). The Guidelines state that "public official" is to be broadly construed and includes "[a]n individual who . . . (i) is in a position of public trust with official responsibility for carrying out a government program or policy; (ii) acts under color of law or official right; or (iii) participates so substantially in government operations as to possess de facto authority to make governmental decisions." *Id.* § 2C1.1(A) cmt. n.1.

Given this intentionally broad construction of "public official," the above category likely applies to CLIENT. COMPANY, a 501(c)(12) nonprofit, was created by the Maryland General Assembly and is funded largely by the state and federal government, suggesting that CLIENT was "in a position of public trust with official responsibility for carrying out a government program or policy." *Id.* Further, courts have generally been unreceptive to defendants' assertions that they are not public officials, even in ambiguous circumstances. *See, e.g.*, *United States v. ReBrook*, 58 F.3d 961, 969-70 (4th Cir. 1995) (finding that the attorney for the West Virginia Lottery Commission was an "official holding a high level decision-making or sensitive position); *United States v. Hernandez*, No. 20-50012, 2021 WL 3579386 (9th Cir. Aug. 13, 2021) (finding that an employee of Fannie Mae, a private company under a government conservatorship, was a public official).

CLIENT could likely be a public official based exclusively on the Navy contract, though this is less clear, and no case law speaks directly to this issue. In *United States v. Dodd*, a guard at a private prison that housed federal inmates conceded that he was a "public official" but unsuccessfully disputed that he held a high-level decision-making position. 770 F.3d 306, 308 (4th Cir. 2014). Though a very different context, this arguably suggests that an employee of an

organization involved in the execution of a contract with the government can be a public official. Somewhat similarly, in *United States v. Robinson*, the defendant unsuccessfully appealed a conviction for fraudulently billing the Newark Watershed Conservation Development Corporation ("NWCDC") because NWCDC's status as a private organization negated the "public official" element of her charges. No. 21-1114, 2022 WL 186047, at *1 (3d Cir. Jan. 20, 2022). The court determined that NWCDC was effectively a public actor based on a New Jersey law that a non-profit in a contract with the city related to water supply "exercise[d] the powers and responsibilities of the city." *Id.* Maryland does not appear to have any analogous statutes for utility providers, but the government has a strong argument that the nature of contract between COMPANY and the Navy meant that CLIENT was "in a position of public trust with official responsibility for carrying out a government program or policy."

Applicant Details

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Applicant Education

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Date of BA/BS	**May 2020**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Sports and Entertainment Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**William Minor Lile Moot Court Competition**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

The Honorable Jamar K. Walker
U.S. District Court, E.D. Va.
600 Granby Street
Norfolk, Virginia 23510

Dear Judge Walker:

I am a rising third-year student at the University of Virginia School of Law, and I am writing to apply for a clerkship in your chambers following my graduation in May 2024.

I was raised in Virginia and have spent nearly my entire life in the state. I am working at a firm in Charlottesville this summer, and I plan to practice in Virginia after graduation. I am particularly interested in a clerkship in your chambers so I can become familiar with relevant legal issues in the Commonwealth.

I have enclosed my resume, law school transcript and undergraduate transcript with this application. I have also enclosed an excerpt from a brief I wrote for the Lile Moot Court Competition as a writing sample. Finally, included are letters of recommendation from Professor Deirdre Enright (434-243-4942), Professor Thomas Frampton (434-924-4663), and Professor Charles Barzun (434-924-6454).

Please feel free to reach out to be at the above address, telephone number or email address. Thank you for considering me.

Sincerely,

Samuel Armstrong

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EDUCATION

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- Rex E. Lee Law Society, President
- Virginia Innocence Project Pro Bono Clinic, Volunteer
- Winter Break Pro Bono: Atlanta Legal Aid Society

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B.A., Psychology, *magna cum laude*, May 2020

- Student Body Vice President of Student Services
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EXPERIENCE

Flora Pettit, Charlottesville, VA
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Research Assistant, Summer 2022

- Researched and wrote memoranda on topics related to unsolved crimes
- Audited files of cases suspected of being influenced by improper police tactics

Southern Virginia University, Buena Vista, VA
Sports Information Director, September 2020 – August 2021

- Recorded statistics and wrote press releases for over 150 athletic events
- Managed a team of eight student workers

Wright Thompson, ESPN, Remote Work
Research Assistant, February 2019 – August 2021

- Performed research and transcription for several high-profile stories and podcasts

Baldridge & Associates, Buena Vista, VA
Intern, May 2019 – October 2020

- Assisted with real estate transactions and file organization

Clear Home, Grand Rapids, MI and Buena Vista, VA
Sales Representative, Summer 2017 & Summer 2018

- Sold over 150 DirecTV accounts door-to-door

The Church of Jesus Christ of Latter-day Saints, Ogden, UT
Full-time Missionary, July 2014 – July 2016

- Contacted and served hundreds of people from diverse backgrounds

INTERESTS

Running, camping, live music, and NBA basketball

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Samuel Armstrong

Date: June 06, 2023
Record ID: ygm5ct

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2021			
LAW	6000	Civil Procedure	4	B+	Woolhandler,Nettie A
LAW	6002	Contracts	4	B+	Johnston,Jason S
LAW	6003	Criminal Law	3	A	Frampton,Thomas Ward
LAW	6004	Legal Research and Writing I	1	S	Ware,Sarah Stewart
LAW	6007	Torts	4	B+	White,George E
		SPRING 2022			
LAW	6001	Constitutional Law	4	B+	Solum,Lawrence
LAW	7009	Criminal Procedure Survey	4	B+	Harmon,Rachel A
LAW	6113	Intro to Law and Business	2	B+	Geis,George Samuel
LAW	6005	Lgl Research & Writing II (YR)	2	S	Ware,Sarah Stewart
LAW	6006	Property	4	B+	Johnson,Alex M
		FALL 2022			
LAW	7017	Con Law II: Religious Liberty	3	B	Schwartzman,Micah Jacob
LAW	6104	Evidence	4	A-	Barzun,Charles Lowell
LAW	9327	Law & Social Science Colloqium	1	B+	Mitchell,Paul Gregory
LAW	7085	Social Science in Law	3	A-	Monahan,John T
LAW	7087	Sports Law	3	A-	Hartley,Sarah Levine
		SPRING 2023			
LAW	7692	Persuasion (SC)	1	A-	Shadel,Molly Bishop
		SPRING 2023			
LAW	6102	Administrative Law	3	A-	Woolhandler,Nettie A
LAW	8003	Civil Rights Litigation	3	B+	Frampton,Thomas Ward
LAW	7023	Emply Law: Contrcts/Torts/Stat	3	A-	Verkerke,J H
LAW	8667	Fed Crim Sent Reduc Clinic	3	P	Maguire,Mary E.
LAW	9501	Race and Law Short Course (SC)	1	B+	Allen,Terry L.

Southern Virginia University

ID : 219569
Name : Samuel Armstrong

Address : 2462 Walnut Ave
Buena Vista, VA 24416-2610

Undergraduate Division
Advisors : Dr. Jeffery Clark Batis

Course Number	Title	CR Type	Gra	Rpt	Att	Ernd	HGpa	Q.Pts	GPA
Transfer Year : Transfer Term I									
Organization : Dabney S. Lancaster									
ENG 110 01	Elements of Composition	RG	T		0.00	3.00	0.00	0.00	
ENG 175R 01	Topics: College Comp II	RG	T		0.00	3.00	0.00	0.00	
MAT 175R 01	Topics: Precalc I	RG	T		0.00	3.00	0.00	0.00	
MAT 175R 01	Topics: Precalc II	RG	T		0.00	3.00	0.00	0.00	
PSY 201 01	General Psychology I	GE	T		0.00	3.00	0.00	0.00	
PSY 345 01	Abnormal Psychology	RG	T		0.00	3.00	0.00	0.00	
Organization : Church Educational System									
REL 390 01	Topics: Teachings of Joseph	PF	T		0.00	2.00	0.00	0.00	
	Term Totals :				**0.00**	**20.00**	**0.00**	**0.00**	**0.0000**
	Career Totals :				**0.00**	**20.00**	**0.00**	**0.00**	**0.0000**
2016-2017 : Fall Semester									
ENG-120 -06	College Composition	GE	A-		3.00	3.00	3.00	11.01	
LIB-110 -02	Reason and the Self	GE	A		3.00	3.00	3.00	12.00	
PER-143 -05	Health and Wellness	GE	A		2.00	2.00	2.00	8.00	
PER-259R -08	Physical Conditioning M Bas	PF	P		0.50	0.50	0.00	0.00	
SER-103 -02	Becoming a Leader-Servant	GE	A		1.00	1.00	1.00	4.00	
SPN-101 -04	Spanish I	GE	A-		4.00	4.00	4.00	14.68	
	Term Totals :				**13.50**	**13.50**	**13.00**	**49.69**	**3.8223**
	Career Totals :				**13.50**	**33.50**	**13.00**	**49.69**	**3.8223**
Provost's List									
2016-2017 : Spring Semester									
BUS-201 -01	Intro to Financial Accounting	RG	A		3.00	3.00	3.00	12.00	
LIB-120 -01	America and the Enlightenm	GE	A		3.00	3.00	3.00	12.00	
MAT-115 -03	College Algebra	GE	A-		3.00	3.00	3.00	11.01	
PER-259R -08	Physical Conditioning M Bas	PF	P		0.50	0.50	0.00	0.00	
SPN-102 -02	Spanish II	GE	A-		4.00	4.00	4.00	14.68	

Undergraduate Division
Advisors : Dr. Jeffery Clark Batis

Course Number	Title	CR Type	Gra	Rpt	Att	Ernd	HGpa	Q.Pts	GPA
2016-2017 : Spring Semester									
Subterm : Fall Block II									
LIB-203 -04	Information Literacy--Block I	GE	A		1.00	1.00	1.00	4.00	
	Subterm Totals :				**1.00**	**1.00**	**1.00**	**4.00**	**4.0000**
	Term Totals :				**14.50**	**14.50**	**14.00**	**53.69**	**3.8350**
	Career Totals :				**28.00**	**48.00**	**27.00**	**103.38**	**3.8289**
Provost's List									
2016-2017 : Summer Term 1									
SPN-201 -02	Spanish III (Travel Study)	GE	A		4.00	4.00	4.00	16.00	
	Term Totals :				**4.00**	**4.00**	**4.00**	**16.00**	**4.0000**
	Career Totals :				**32.00**	**52.00**	**31.00**	**119.38**	**3.8510**
2017-2018 : Fall Semester									
BIO-114 -02	Biological Concepts	GE	A-		4.00	4.00	4.00	14.68	
HIS-210 -02	Western Civilization I	GE	A		3.00	3.00	3.00	12.00	
PER-259R -08	Physical Conditioning M Bas	PF	P		0.50	0.50	0.00	0.00	
PER-275R -01	Topics: Intro to Sports Mana	RG	A		3.00	3.00	3.00	12.00	
PSY-223 -01	Performance & Sports Psycl	RG	A		3.00	3.00	3.00	12.00	
	Term Totals :				**13.50**	**13.50**	**13.00**	**50.68**	**3.8985**
	Career Totals :				**45.50**	**65.50**	**44.00**	**170.06**	**3.8650**
Provost's List									
2017-2018 : Spring Semester									
LIB-130 -02	Classics of Western Literatu	GE	A-		3.00	3.00	3.00	11.01	
PER-259R -08	Physical Conditioning M Bas	PF	P		0.50	0.50	0.00	0.00	
PHI-223 -01	Introduction to Logic	RG	A		3.00	3.00	3.00	12.00	
PHY-117 -01	Physics Fundamentals	GE	A		3.00	3.00	3.00	12.00	
PSY-320 -01	Social Psychology	RG	A		3.00	3.00	3.00	12.00	

Southern Virginia University

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Name : Samuel Armstrong

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Undergraduate Division
Advisors : Dr. Jeffery Clark Batis

Course Number	Title	CR Type	Gra	Rpt	Att	Ernd	HGpa	Q.Pts	GPA
2017-2018 : Spring Semester									
PSY-335 -01	Positive Psychology	RG	A		3.00	3.00	3.00	12.00	
	Term Totals :				**15.50**	**15.50**	**15.00**	**59.01**	**3.9340**
	Career Totals :				**61.00**	**81.00**	**59.00**	**229.07**	**3.8825**
Provost's List									
2018-2019 : Fall Semester									
ENG-375R -05	Top:Writing in Mass Media	RG	A		3.00	3.00	3.00	12.00	
HIS-326 -01	American Civil War- Recons	AU	NC		0.00	0.00	0.00	0.00	
MAT-221 -02	Statistics	GE	A		3.00	3.00	3.00	12.00	
PER-259R -08	Physical Conditioning M Bas	PF	P		0.50	0.50	0.00	0.00	
POL-223 -01	American Government and	GE	A		3.00	3.00	3.00	12.00	
PSY-230 -01	Lifespan Development	RG	A		3.00	3.00	3.00	12.00	
PSY-310 -01	Cultural Psychology	RG	A		3.00	3.00	3.00	12.00	
	Term Totals :				**15.50**	**15.50**	**15.00**	**60.00**	**4.0000**
	Career Totals :				**76.50**	**96.50**	**74.00**	**289.07**	**3.9064**
Provost's List									
President's List									
2018-2019 : Spring Semester									
HIS-325R -01	Race in America	RG	A		3.00	3.00	3.00	12.00	
POL-365R -01	Intro to the Study of Law	RG	A		1.00	1.00	1.00	4.00	
PSY-290 -01	Research Methods	RG	A-		3.00	3.00	3.00	11.01	
PSY-333 -01	Psychology of Learning	RG	A		3.00	3.00	3.00	12.00	
WRI-320 -05	Advanced Composition	GE	A		3.00	3.00	3.00	12.00	
Subterm : Spring Block I									
PER-175R -05	Cornhole	PF	P		1.00	1.00	0.00	0.00	
	Subterm Totals :				**1.00**	**1.00**	**0.00**	**0.00**	**0.0000**
	Term Totals :				**14.00**	**14.00**	**13.00**	**51.01**	**3.9238**
	Career Totals :				**90.50**	**110.50**	**87.00**	**340.08**	**3.9090**
Provost's List									

Undergraduate Division
Advisors : Dr. Jeffery Clark Batis

Course Number	Title	CR Type	Gra	Rpt	Att	Ernd	HGpa	Q.Pts	GPA
2019-2020 : Fall Semester									
HUM-215 -01	Arts in Western Civilization I	GE	A		3.00	3.00	3.00	12.00	
LIB-375R -02	Student Government	RG	A		2.00	2.00	2.00	8.00	
MUS-129R -01	Group Voice Instruction	GE	A		3.00	3.00	3.00	12.00	
PER-259R -08	Physical Conditioning M Bas	PF	P		0.50	0.50	0.00	0.00	
PSY-350 -01	Behavioral Neuroscience	RG	A-		3.00	3.00	3.00	11.01	
REL-250 -03	Jesus Christ & the Everlasti	PF	P		2.00	2.00	0.00	0.00	
	Term Totals :				**13.50**	**13.50**	**11.00**	**43.01**	**3.9100**
	Career Totals :				**104.00**	**124.00**	**98.00**	**383.09**	**3.9091**
Provost's List									
2019-2020 : Spring Semester									
ENG-220 -01	Fundamentals of Creative W	RG	A		3.00	3.00	3.00	12.00	
LIB-375R -02	Student Government	RG	A		2.00	2.00	2.00	8.00	
PER-259R -08	Physical Conditioning M Bas	PF	P		0.50	0.50	0.00	0.00	
PSY-450 -01	History and Systems	RG	A		3.00	3.00	3.00	12.00	
SKL-175R -10	Anyone Can Code	RG	A		1.50	1.50	1.50	6.00	
	Term Totals :				**10.00**	**10.00**	**9.50**	**38.00**	**4.0000**
	Career Totals :				**114.00**	**134.00**	**107.50**	**421.09**	**3.9171**
President's List									
	Division Career Totals :				**114.00**	**134.00**	**107.50**	**421.09**	**3.9171**

Degree Information :

(1) 'Bachelor of Arts' Date Conferred : 05/16/2020

Major(s)

Psychology

Honor(s)

Magna Cum Laude

June 06, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend highly Samuel Armstrong for a clerkship in your chambers. Sam is a smart and focused young man, who I think would make a very strong clerk in your chambers.

I got to know Sam the fall of his second year when he enrolled in my Evidence class. I teach Evidence in a fairly traditional way, using a combination of Socratic method, lecture, and voluntary class discussion. Sam's class had only 46 students in it, which was much smaller than my typical Evidence class because it was in the fall and so had no first-year students. That fact meant that I got to know the students better than I normally do. Sam did not speak up as much as some of the other students in the class, but whenever I called on him, he seemed to know just what my questions were getting at. So I was not surprised that he did well on the final exam, earning an A- for the course.

Sam's performance in my class has been typical of his law-school performance overall. After three semesters, he has a GPA of 3.42, which places him in about the middle of his class. He also has thrown himself into the intellectual and extracurricular life of the law school. He competed as a Quarterfinalist in the Lile Moot Court Competition (more on that below); he serves on the editorial board of the Virginia Sports and Entertainment Law Journal; he has volunteered at the Virginia Innocence Project; and finally, he is the President of the Rex E. Lee Law Society.

Sam's record speaks for itself, but let me just add one more personal note about him. I served as one of the three judges for the Quarterfinals of the moot-court competition in which Sam and his partner failed to advance. As we told the students at the time, it was a very hard decision because both Sam and his partner wrote a very strong brief and argued it well. What particularly impressed me, though, was that a few days later, Sam reached out to me to get more feedback on his brief and to learn more about what he could have done better. In our discussion, it was clear that Sam was really taking in the comments I offered. It struck me that Sam seemed to be the kind of person who is laser-focused on improving his legal skills.

I'm not sure what explains Sam's focus and desire to improve. Perhaps it's because he was a star college basketball player who'd been advised by the school's coach not to even tryout for the team. Perhaps it's because he is more mature than the typical law student. He completed a two-year mission in Utah before attending college and is now married with one child and another on the way. Or perhaps it is due to his growing up in a small, rural, working-class down, where hard work was an expectation and a necessity. Whatever the reason, Sam has become a thoughtful, solid young man, who knows what he's about, what his goals are, and is determined to put in the effort necessary to achieve them.

In Sam's case, those goals entail becoming an expert litigator in private practice or public service. I have every reason to think he will do just that. For underneath his quiet and unassuming manner, is an able mind and a fierce will to improve and excel. For the same reasons, I think he will make a great judicial clerk. Still, if you have any questions about Sam, or would like to discuss his candidacy any further, please do not hesitate to email me (cbarzun@virginia.edu) or call me at any time (434-924-6454), and I will call you back at your convenience.

Sincerely,

Charles L. Barzun

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am very pleased to write on behalf of Sam Armstrong, who is applying to serve as your law clerk upon graduation. I know Sam very well—I've taught him twice now, both times in relatively small classes—and I enthusiastically agreed to serve as a recommender when he broached the topic. Apart from doing very well in my classes, he has proven himself to be an exceedingly mature, thoughtful, earnest, and kind person, and I think he would make an excellent law clerk.

On the academic front, Sam has been a pleasure to have in class. While my familiarity with his writing is limited to time-limited exams, what I've seen has been excellent. His exam in my Criminal Law class as a 1L was perhaps the very best in the class (of around 40 students), and throughout the year, he never fumbled a cold-call. He received a grade of "A." He did not perform as well on his final exam in my Civil Rights Litigation class this term (earning "only" a grade of "B+"). But his in-class participation was of a similar caliber. He volunteered when there is a lull in the conversation, but he would never dominate the room. Sam is generally confident in his views, but he seems to approach every topic or issue with a degree of humility: when he says that he tries to see "both sides" to a particular issue, it comes from a very sincere place.

On a personal level, it is difficult to say enough positive things about Sam. While curious and excited about the course material, Sam carries himself with the maturity of a much older law student, and I think his classmates have gravitated toward him as a result. (I have a tough time articulating what it means to have natural "leadership" qualities, but whatever that is, Sam's got it. I have no doubt about his ability to work collaboratively with other co-clerks.) He is disciplined about time-management, a skill he attributes to becoming a father at a relatively young age, and somehow never seems rushed or ill-prepared. He loves sports and is a talented athlete, but would never be mistaken for a "jock": he has a self-deprecating and conscientious manner that is almost impossible to dislike.

In short, I know Sam would make a fantastic law clerk and recommend him highly. If there is any additional information I can provide, please do not hesitate to write (tframpton@law.virginia.edu) or call (202.352.8341).

Sincerely,

Thomas Frampton
Associate Professor of Law
University of Virginia School of Law

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Samuel Armstrong for a clerkship with your office. Sam was my Research Assistant for the summer of 2022 and he worked on a pro bono project with a team of law students over winter break. Thus, unlike many professors, I have spent a considerable amount of time with Sam and have gotten to know him well. Sam is both smart and thoughtful, loyal and reliable.

Like so many other law students, Sam's legal education was negatively impacted by the pandemic, and for a considerable span of time, controlled by uncertainty. UVA School of Law has a B+ mean, so Sam's 1L grades were solid, but once there was more normalcy in classroom teaching and student activity, Sam began to really excel. Sam also clearly found his footing during his participation in the William Lyle Moot Court Competition where he and his partner were quarterfinalists. Sam loved the research and writing of the briefs as much as he enjoyed the preparation for and participation in oral argument.

As my Research Assistant, Sam was involved in several different projects I was working on. For one, we were documenting and analyzing massive amounts of evidence at a Commonwealth's Attorney's office in Virginia. Sam had to photograph, upload, describe and tag discovery. He was also required to create and maintain a timeline for a deceased serial killer, in an effort to link the serial killer to unsolved crimes both in and outside the United States. At a different Commonwealth's Attorney's office, I have been asked to review all the cases of a former detective who was convicted of federal crimes and served over ten years. Sam had to review many files, looking for red flags that this detective had engaged in misconduct. The signs were often subtle and required thinking "outside the box" – and Sam caught many, asking excellent questions along the way.

For both projects, we had to travel considerable distances, so in addition to working together, we also socialized. Sam was an excellent team player with his peers, offering to lead when that was needed, and equally content to follow the lead of other more experienced law students. During his two years of work as missionary for his church, Sam became quite adept at being repeatedly required to work with complete strangers, so his comfort level in a variety of social settings is noteworthy. Sam was a solid, diligent, reliable research assistant and a pleasure to work with, both for me and for his peers.

Please do not hesitate to contact me with any other questions.

Sincerely,

Deirdre M. Enright
Professor of Law
Director, Center for Criminal Justice
Director, Project for Informed Reform

Deirdre Enright - deirdre@law.virginia.edu - (434) 243-4942

Samuel B. Armstrong

40 Wilton Pasture Lane, Apt. 201, Charlottesville, VA 22911 • (540) 416-8869 • ygm5ct@virginia.edu

The attached writing sample is excerpted from an appellate brief that I wrote for the quarterfinal round of the William Minor Lile Moot Court Competition. In this excerpt, I argue that parents do not have a constitutional right to opt their children out of school curriculum regarding gender identity and transgender issues. For length and clarity, I have included only the first three parts of the argument. I have omitted the standard of review, statement of the case, summary of argument, and the fourth part of the argument. The full brief is available upon request. This writing sample is my own work and has not been edited by any other person.

ARGUMENT

I. THE FOURTEENTH AMENDMENT DOES NOT CONTAIN A FUNDAMENTAL RIGHT ALLOWING PARENTS TO OPT THEIR CHILDREN OUT OF MANDATORY SCHOOL CURRICULUM.

The District Court was correct in finding that no fundamental right exists for parents to opt their children out of mandatory school curriculum and in granting Mr. Rooney's motion to dismiss. The asserted right fails the history and tradition test found in *Washington v. Glucksberg*, 521 U.S. 702 (1997), does not fall within the *Meyer-Pierce* doctrine, and is contrary to important state interests. In ruling for the appellee, this court will remain consistent with the Supreme Court's practice of being "'reluctant' to recognize rights that are not mentioned in the Constitution." *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2247 (2022) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

A. **A parental opt-out right does not pass the Glucksberg test.**

When confronted with a challenge to find a Fourteenth Amendment substantive due process right, the Supreme Court has turned to the *Glucksberg* test, which requires that the asserted right "must be 'deeply rooted in this Nation's history and tradition' *and* 'implicit in the concept of ordered liberty.'" *Dobbs*, 142 S. Ct. at 2242 (quoting *Glucksberg*, 521 U.S. at 721) (emphasis added).

This is a difficult test to meet for at least three reasons. First, both prongs of the test must be satisfied. A substantive due process right cannot either be deeply rooted in this Nation's history and tradition *or* implicit in the concept of ordered liberty, it must be both. Second, each prong is difficult to meet. To meet the "history and tradition" prong, the asserted right must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The words "rooted" and "fundamental" indicate that

much more than an anecdotal or inconsistent connection is needed. The "ordered liberty" prong requires one to prove that without the asserted right "a fair and enlightened system of justice would be impossible," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and that "neither liberty nor justice would exist if [it] was sacrificed." *Id.* at 326. Finally, the *Glucksberg* bar is so difficult to meet because a court must begin with a presumption against finding the asserted unenumerated right. The Court has urged judicial moderation in this area because "[s]ubstantive due process has at times been a treacherous field for this Court . . . [and] that history counsels caution and restraint." *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977); *see also Dobbs*, 142 S. Ct. 2228 at 2247 ("[W]e must guard against the natural human tendency to confuse what the Amendment protects with our own ardent views about the liberty that Americans should enjoy.").

To overcome all three of these hurdles is a monumental task reserved for only the most fundamental rights. The asserted right for parents to opt their children out of curriculum is not one of them.

1. ***A parental opt-out right is not rooted in this Nation's history and tradition.***

Recent cases that have applied the *Glucksberg* test have placed an emphasis on the state of the law as it was in 1868, the year the Fourteenth Amendment was adopted. *See Dobbs*, 142 S. Ct. at 2285 (providing an appendix "contain[ing] statutes criminalizing abortion at all stages of pregnancy in the States existing in 1868."); *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2136 (2022) ("The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates either date may not illuminate the scope of the right . . .").

Relevant cases from the late nineteenth century are inconsistent on whether it was a common practice for courts to find a parental opt-out right. Some courts ruled in favor of the

parents. *Morrow v. Wood*, 35 Wis. 59 (Wis. 1874) (holding that a teacher cannot compel a student to attend a geography class against the wishes of his parent); *Rulison v. Post*, 79 Ill. 567 (Ill. 1875) (bookkeeping class); *Trs. of Schs. v. People ex rel. Van Allen*, 87 Ill. 303 (Ill. 1877) (grammar class); *State ex rel. Sheibley v. Sch. Dist. No. 1*, 31 Neb. 552, 48 N.W. 393 (Neb. 1891) (grammar class).

Other courts ruled in favor of the schools. *Kidder v. Chellis*, 59 N.H. 473 (N.H. 1879) (holding that a school may compel a student to attend a public speaking class against the wishes of his parent); *State ex rel. Andrews v. Webber*, 8 N.E. 708 (Ind. 1886) (music class); *see also Guernsey v. Pitkin*, 32 Vt. 224 (Vt. 1859) (composition class); *Sewell v. Bd. of Educ.,* 29 Ohio St. 89 (1876) (rhetoric class).

The point here is not whether these cases were decided correctly, but to draw attention to the inconsistent and diverging opinions on the matter. On a level playing ground, whether it was a common practice for courts to allow parents to opt out their children is inconclusive. But the ground upon which a substantive due process right must be established is not level; it slants steeply away from the recognition of the asserted right. The difficulty of meeting both prongs of the *Glucksberg* test, combined with the Court's mandate to practice judicial restraint, requires clear and conclusive evidence of a history and tradition of parental opt-outs. The relevant early caselaw is inconsistent and does not support such a right.

Instead, historical evidence shows that parents have a duty, more so than a right, to educate their children, and that this duty falls within the scope of legislative control. In 1868, the constitutions of thirty-six out of thirty-seven states contained a provision requiring the state to provide a public school for minors. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment was Ratified in 1868: What Rights*

Are Deeply Rooted in American History and Tradition?, 87 Tex. L. Rev. 7, 108 (2008). Due to this near consensus, "it is fair to construe these clauses as in effect guaranteeing individuals a right to some kind of government provision of a public-school education." *Id.* In other words, children had, and therefore still have, a right to learn.

Because of this right to learn, any power that parents have over their children's education does not exist independently, rather, "[t]he power of parents over their children is derived from the former consideration, their duty." 1 William Blackstone, *Commentaries on the Laws of England* 440 (Univ. of Chicago Press 1979). An early Maine case supports this proposition, asserting that "this paternal power is not of the nature of a sovereign and independent power. . . . It is not a power granted to the parent for his benefit, but allowed to him for the benefit of the child." *Etna*, 8 F. Cas. 803, 804 (D. Me. 1838).

Historically, the state also had a duty to educate children, but the government's role was not for the benefit of the child only. The state had a "paramount interest in the . . . knowledge of its members, and that, of strict right, the business of education belongs to it." *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839); *see also State v. Shorey*, 86 P. 881, 882 (Or. 1906) ("[T]he state standing in the position of *parens patriae* . . . is a power which inheres in the government for its own preservation and for the protection of life, person, health and morals of its future citizens."). Additionally, the state has a history of acting in a compulsory manner when it comes to the well-being and education of children. Blackstone commented on English laws and practices that took children away from poor parents and "placed out by the public in such a manner, as may render their abilities . . . of the greatest advantage to the commonwealth." Blackstone, *supra* at 439. While children are not taken away from parents due to financial status today, the state still

rightfully inserts itself in cases where parents neglect their duty. Thus, the control a parent has over a child's upbringing was susceptible to restrictions by the state.

This was, in essence, the relationship between parent, child, and the state in the early United States. Children held a deeply rooted right to be educated, both parents and the state had a duty to educate them, and the state had power over parents in certain circumstances. Parents did not have an absolute right to control the entirety of a child's education, rather, "the power of a parent by our English laws is much more moderate." Blackstone, *supra* at 440. And a review of early caselaw and commentary reveals that the power to parent "is subject to the restraints and regulation of law." *Etna*, 8 F. Cas. at 804; *see also State v. Clottu*, 33 Ind. 409, 412 (1870) ("The subject [of parent-child relations] has always been regarded as within the purview of legislative authority."). Therefore, the notion that a parent has a deeply rooted right to take her child away from educational curriculum established by the state fails the history and tradition prong of the *Glucksberg* test.

2. ***A parental opt-out right is not implicit in the concept of ordered liberty.***

Even if it is found that there is a deeply rooted right for a parent to opt their child out of mandatory education, the right is not "'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [it were] sacrificed.'" *Glucksberg*, 521 U.S. at 721 (quoting *Snyder*, 291 U.S. at 105). As of now, the Supreme Court has not recognized a parental right to control their child's education to the point of opting him out of mandatory courses. Has liberty ceased to exist in education on a national scale? In states that have denied a right to parental opt-outs, has it been "impossible" to "maintain . . . a fair and enlightened system of justice?" *Palko*, 302 U.S. at 325. Reason implores a negative answer to both questions.

The *Dobbs* Court counselled that "ordered liberty sets limits and defines the boundary between competing interests." 142 S. Ct. at 2257. The Court then discussed how there are strong interests on all sides of the abortion debate, and that "people of the various States may evaluate those interests differently." *Id.* The same is true in the public education context. Some passionately believe that parents should play an active role in the classroom, including deciding the curriculum and teaching materials. Others vehemently disagree. Because opinions vary so broadly, allowing each state or locality to determine the policies and curriculum of each school is most appropriate. "Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated," *id.*, and the same is true in public education. To find that there is a constitutional right allowing parents to opt children out of curriculum would be to violate this ordered liberty and "usurp authority that the Constitution entrusts to the people's elected representatives." *Id.* at 2247 (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225–26 (1985)).

Whether parents can opt their children out of the VAI pilot program at Garfinkel Elementary is a decision that should be made by the North Lile School Board and its superintendent, Mr. Rooney. Compared to the judiciary, school boards have all the advantages listed by Justice Scalia in his *Troxel v. Granville* dissent when discussing state legislatures, namely that they "do[] harm in a more circumscribed area . . . [are] able to correct their mistakes in a flash, and [are] removable by the people." *Troxel v. Granville*, 530 U.S. 57, 93 (2000) (Scalia, J., dissenting). But if a federal circuit court were to rule that parental rights extend to curricular opt-outs, the decision would undermine the state's interest across a very great population. And even if the decision was best for some school districts, it would not be for others. This choice should remain with those who know the needs of students, parents, and

schools in the local system, thus preserving ordered liberty by allowing each school district to "set[] limits and define[] the boundary between competing interests." *Dobbs*, 142 S. Ct. at 2257.

The asserted constitutional right of a parental opt-out fails both prongs of the *Glucksberg* test and therefore should not be held to be a due process right protected by the Fourteenth Amendment.

B. **The *Meyer-Pierce* right does not encompass parental opt-outs.**

Against the backdrop of this history and tradition come *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *Meyer* and *Pierce* hold that parents and guardians have a liberty interest in "direct[ing] the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534. It is often argued, as it was at the District Court below, that this *Meyer-Pierce* right this gives parents the constitutional right to opt their children out of certain curriculum. (R. at 5.) However, "identifying a general parental right is far different than concluding that it has been infringed," *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036, 1042 (9th Cir. 2000), and the *Meyer* and *Pierce* opinions themselves do not paint with such broad strokes. The opinions stand for a much more modest idea: that the state cannot prevent children from being educated.

Meyer involved a Nebraska statute prohibiting the teaching of any language other than English in schools before the ninth grade. 262 U.S. at 396. Thus, the thrust of the Nebraska statute was to *prevent* children from being educated. In striking down the statute, the Court remarked that the liberty guaranteed by the Fourteenth Amendment Due Process Clause included "the right of the individual . . . to acquire useful knowledge." *Id.* at 399. The opinion repeatedly reiterated the value of education, *id.* at 400, and the Court also explained that "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education suitable to

their station in life." *Id.* Finally, the Court asserted that there is a "right of parents to engage [teachers] so to instruct their children." *Id.*

Pierce also involved a statute restricting a child's educational opportunities, in this case requiring parents to send their children between the ages of eight and sixteen to a public school as opposed to a private school. 268 U.S. at 530. Relying upon the reasoning in *Meyer*, the Court ruled that the statute "interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children." *Id.* at 534–35. Statutes that prevented parents from employing qualified teachers to educate their children were thus unconstitutional.

Meyer and *Pierce* each explicitly recognized that at least some regulation over schools is acceptable. *See Meyer*, 262 U.S. at 402 ("The power of the state to . . . make reasonable regulations for all schools . . . is not questioned."); *Pierce*, 268 U.S. at 534 ("No question is raised concerning the power of the state reasonably to regulate all schools . . . to require . . . that certain studies plainly essential to good citizenship must be taught."). Further, the opinions "do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught." *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003).

The ideals espoused in *Meyer* and *Pierce*—that there is a constitutional right to learn, that knowledge is necessary to a functioning government, that government can regulate schools to promote education, and that parents have a duty to provide education for their children and have a right to employ teachers to that end—perfectly aligns with a correct historical understanding of the relationship between child, parent, and state. The Court surely recognized the balance that is needed between these competing interests. With the state threatening to tip the scales too far in its direction by imposing both a "curricular monopoly" and an "institutional" monopoly in a

manner that would restrict education, the Court rightly pushed back. Jeffrey Shulman, *The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?*, 89 Neb. L. Rev. 290, 338 (2010).

Once one understands that *Meyer* and *Pierce* "evince the principle that the state cannot prevent parents from choosing a specific educational program," *Brown v. Hot, Sexy and Safer Prods.*, 68 F.3d 525, 533 (1st Cir. 1995), it is evident that the *Meyer-Pierce* right does not extend to this case. Unlike the statutes in *Meyer* and *Pierce*, the VAI program neither involves a threat to a child's education nor prevents parents from choosing an educational program. Also, nothing is preventing parents from teaching their kids at home or finding a private school that better aligns with their values.

C. The circuit courts have overwhelmingly chosen not to extend the *Meyer-Pierce* right in a variety of school-related situations.

The Supreme Court has held that "neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *see also Norwood v. Harrison*, 413 U.S. 455, 461 (1973) ("Yet the Court's holding in *Pierce* is not without limits.").

Accordingly, the overwhelming majority of U.S. Courts of Appeals have declined to extend the *Meyer-Pierce* right in variety of school-related situations, allowing the state to exercise its *parens patriae* authority. *See Brown v. Hot, Sexy and Safer Prods.*, 68 F.3d 525 (1st Cir. 1995) (holding that a parent's *Meyer-Pierce* right did not encompass opting child out of sexually explicit AIDS awareness assembly); *Parker v. Hurley*, 513 F.3d 87 (1st Cir. 2008) (curricular materials encouraging respect for gay individuals and couples); *Leebaert v.*

Harrington, 332 F.3d 134 (2d Cir. 2003) (mandatory health education course); *Herndon v. Chapel Hill-Carrboro City Bd. of Ed.*, 89 F.3d 174 (4th Cir. 1996) (school district's mandatory community service program); *Littlefield v. Forney Ind. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001) (mandatory school uniform policy); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005) (mandatory school dress code); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005) (survey containing questions about sex); *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 699 (10th Cir. 1998) ("[P]arents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject.").

Like these seven circuits, this court should be "reluctant to expand the concept of substantive due process" in this context. *Collins*, 503 U.S. at 125. Doing so will provide more consistency across the country on parental rights in schools, and it is more aligned with a correct historical understanding of the relationship between child, parent, and state.

Perhaps the only outlier is the Third Circuit, but even that is questionable. In *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000), a high school swimming coach repeatedly urged one of his athletes to take a pregnancy test. The Third Circuit ruled that this violated the rights of the student's mother because the topic of pregnancy was a matter of family relations that the state should not be involved in. *Id.* at 303. On the other hand, the Third Circuit in *C.N. v. Ridgewood Bd. of Ed.*, 430 F.3d 159 (3d Cir. 2017), held that a questionnaire seeking details about students' personal lives, including drug use, mental health, and sexual activity, was not of sufficient "gravity" to "rise to the level of a constitutional violation." *Id.* at 184–85. The court recognized a "distinction between actions that strike at the heart of parental decision-making on matters of the

greatest importance and other actions that, although perhaps unwise and offensive, are not of constitutional dimension." *Id.* at 184.

Even if this court were to decide this case under the Third Circuit standard, the decision in *Gruenke* is not controlling for at least two reasons. First, *Gruenke* can be factually distinguished from the case at bar, as well as the other circuit cases listed above, because it does not relate to education. While a health education class's curriculum, or even a school dress code, promotes education, a coach forcing a teenager to take a pregnancy test does not. Further, the coach in *Gruenke* made a one-off decision unlike the scenarios in any of the other circuit cases. The VAI program, which was instituted by the superintendent, planned by the teacher, and approved by the superintendent, falls in line with the other cases on a structural level.

Second, while some parents and students might consider learning about transgender issues "unwise and offensive," *Ridgewood*, 430 F.3d at 184, it is hardly comparable to the pressure and invasive nature of being asked to take a pregnancy test by one's coach. There is perhaps no other topic that implicates parental relationships more than a teenage pregnancy, and taking a pregnancy test requires specific action on the part of the individual. Education about gender identity is passive and simply does not connect to parental relationships to the same degree. If Ms. Reynolds were to ask a student to transition or to change gender identities, that would be comparable to *Gruenke* and certainly rise to the level of a constitutional violation. But nothing of the sort is in the curriculum.

Because the VAI program is factually similar to the cases to which courts have failed to find a parental opt-out right, and because the curriculum does not "strike at the heart of parenting," *Ridgewood*, 430 F.3d at 184, the *Meyer-Pierce* right does not extend to this context.

Applicant Details

First Name	**P.J.**
Last Name	**Austin**
Citizenship Status	**U. S. Citizen**
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Address	**Address** **Street** **2711 E Shoreham St** **City** **Durham** **State/Territory** **North Carolina** **Zip** **27707-2959** **Country** **United States**
Contact Phone Number	**5627283126**

Applicant Education

BA/BS From	**University of California-Santa Barbara**
Date of BA/BS	**December 2018**
JD/LLB From	**Duke University School of Law** **https://law.duke.edu/career/**
Date of JD/LLB	**May 7, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Duke Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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Hall, Jason
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Siegel, Neil S.
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919-613-7157

This applicant has certified that all data entered in this profile and any application documents are true and correct.

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May 28, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510

Dear Judge Campbell,

I am writing to apply for a clerkship in your chambers for the 2024–2025 term. I am a recent graduate of Duke University School of Law. This fall, I will be a first-year associate in Cahill Gordon & Reindel's New York office.

I believe I have the research and writing skills to excel as your clerk. While at Duke Law, I have enhanced my legal skills by competing in moot court competitions, participating in Duke's Appellate Practice course, and working as a research editor for the Duke Law Journal. Last spring, I coauthored an essay about Black farmers, entitled *Rattlesnakes, Debt, and ARPA § 1005: The Existential Crisis of American Black Farmers*, which the Duke Law Journal Online published. During the summer of 2021, I interned for Judge Mary Ellen Coster Williams of the Court of Federal Claims in Washington, DC. In this role, I worked closely with the judge and her clerks and saw firsthand the importance of thorough research, clear writing, and collaboration.

Letters of recommendation on my behalf can be sent by Duke from the following individuals:

Professor Neil Siegel	Professor Barak Richman	Jason Hall
Duke Law School	Duke Law School	Cahill Gordon & Reindel LLP
(919) 613- 7157	(919) 613-7244	(212) 701-3154
siegel@law.duke.edu	richman@law.duke.edu	jhall@cahill.com

Please let me know if I can provide any other information that would be helpful. Thank you for your time and consideration.

Sincerely,

P.J. Austin

P. J. AUSTIN

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Durham, NC 27707

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(562) 728-3126

6136 Michelson Street
Lakewood, CA 90713

EDUCATION

Duke University School of Law, Durham, NC
Juris Doctor, May 2023
GPA: 3.27
Honors: Duke Law Journal, *Research Editor*
Moot Court, *Board Member*
Activities: Black Law Students Association, *Director of Programming*

University of California, Santa Barbara, Santa Barbara, CA
Bachelor of Arts in Political Science, *with Distinction*, December 2018
GPA: 3.47
Honors: Political Science Honors Program; Gilman Scholar; Dean's Honors
Thesis: *Hobbes's Theory of Obligation Reinterpreted: A Resolution to Apparent Discrepancies*
Study Abroad: Exeter College, Oxford University, United Kingdom, Summer 2018
Activities: Pi Sigma Alpha – National Political Science Honor Society

EXPERIENCE

Professor Barak Richman, Durham, CA
Research Assistant, May 2023 – Present

- Conducted research regarding health care market consolidation and concentration in California.

First Amendment Clinic, Duke Law Clinics, Durham, CA
Legal Intern, January 2023 – April 2023

- Drafted a complaint and motions for litigation regarding defamation and Section 1983.
- Conducted research regarding defamation, public records, statute of limitations, and content moderation.

Cahill Gordon & Reindel, New York, NY
Summer Associate, May 2022 – July 2022

- Conducted research and drafted memos on a variety of issues, including aiding and abetting, securities fraud, and class decertification.
- Drafted motion in limine for upcoming antitrust trial.

The Honorable Mary Ellen Coster Williams, U.S. Court of Federal Claims, Washington, DC
Judicial Intern, June 2021 – July 2021

- Researched legal issues to assist the judge with her review of cases; researched topics such as categorical takings and the validity and enforcement of government contracts.
- Drafted memos summarizing legal findings for efficient review and use by the judge.
- Participated in conferences with the judge and her law clerks on a regular basis to discuss ongoing matters, projects, and needs.

PUBLICATION

Maia Foster & P.J. Austin, *Rattlesnakes, Debt, and ARPA § 1005: The Existential Crisis of American Black Farmers*, 71 DUKE L.J. ONLINE 159 (2022).

ADDITIONAL INFORMATION

Interests: Guitar, Bass, Painting
Other: Dual citizenship (U.S. and Canada), First Generation College and Graduate Student

P.J. Austin

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UNOFFICIAL TRANSCRIPT
DUKE UNIVERSITY SCHOOL OF LAW

2020 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Civil Procedure	Miller, D.	3.3	4.50
Contracts	Richman, B.	3.4	4.50
Criminal Law	Coleman, J.	3.0	4.50
Legal Analysis, Research, Writing	Strauss, E.	*Credit Only*	0.00
Professional Development	Multiple	*Credit Only*	1.00

2021 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Constitutional Law	Young, E.	2.8	4.50
Torts	Frakes, M.	2.9	4.50
Property	Wiener, J.	3.1	4.50
Legal Analysis, Research, Writing	Strauss, E.	3.2	4.00
Counselor and Client	Buell, E.	*Credit Only*	1.00

2021 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Ethics/Law of Lawyering	Richardson, A.	3.2	2.00
Corporate Crime	Buell, S.	3.3	4.00
Appellate Practice	Andrussier, S.	3.3	3.00
Negotiation	Thomson, C.	3.5	3.00

2022 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Art Law	DeMott, D.	3.3	2.00
Appellate Courts	Levy, M.	3.3	2.00
Federal Courts	Siegel, N.	3.1	4.00
Legislative and Statutory Interpretation	Lemos, M.	3.4	3.00

Structuring and Regulating Financial Transactions	Schwarcz, S.	3.8	3.00

2022 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Evidence	Beskind, D.	3.4	4.00
First Amendment	Benjamin, S.	3.2	3.00
Scholarly Writing Workshop	Thorn, A.	3.4	3.00
Readings (Transgender Issues)	Simmons, A.	CR	1.00
Law & Literature: Race & Gender	Jones, T.	3.5	3.00

2023 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Bankruptcy & Corporate Reorganization	Schwarcz, S.	3.4	2.00
Civil Rights Litigation	Miller, D.	3.3	3.00
First Amendment Clinic	Ludington, S. Martin, A.	3.4	4.00
Jury Decision Making	Bornstein, B.	3.4	2.00
Collective Action Constitution	Siegel, N.	3.5	3.00
Readings (The Administrative State)	Mishchenko, L.	*Credit Only*	1.00

TOTAL CREDITS: 87.00
CUMULATIVE GPA: 3.27

Duke University School of Law
210 Science Drive
Durham, NC 27708

May 31, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: P.J. Austin

Dear Judge Walker:

I write to recommend P.J. Austin for a clerkship in your chambers. P.J. was a student in my Fall 2020 Contracts class, and we have since remained in frequent contact. I think he'd be a terrific clerk.

The pandemic made the Fall of 2020 a hard semester for everyone, especially 1Ls, but I was impressed by how resilient and adaptive our class was. P.J. was among those who actively made the most of a difficult situation. In both comments in class and in discussions during office hours, P.J. was actively engaged with the material, and put in enormous time into mastering the material. Despite the virtual setting, I felt like I grew to know him well, and I enjoyed discussing the themes of the class—and law school more generally—during his frequent office hour visits. He worked immensely hard throughout the semester, and I was not surprised that he earned an above-median grade in what was a very talented class.

P.J. is also immensely well-liked by his classmates and the faculty. I noticed during the Fall 2020 semester that he seemed to manage the challenges of isolation well, both seeking out the help he needed for the course and collaborating with classmates to help build the student community. He developed many friends throughout his first year of law school, and I credit students like him for facilitating our school's smooth reintegration to in-person classes. I genuinely enjoy his company, and I've appreciated the additional opportunities I've had to share a meal with him outside of law school regular hours.

I'm confident that P.J. would be a terrific clerk, and I'm delighted that he wants to be one. Too many of our students are preoccupied with starting at a firm, without realizing the richness of the clerkship experience or valuing the public service it entails. P.J. does, and he's clerking for the right reasons. His grades are not as high as our typical clerkship applicant, but that reflects neither the value he'll provide to your chambers nor the benefits he'll accrue from your mentorship. He will be a diligent worker and a terrific team player. He'll invest care and thoroughness into the job, and he'll take pride in the chamber's work.

In short, I hope you consider P.J. for a clerkship. Please feel free to contact me should you wish to discuss his application any further.

Sincerely yours,

Barak D. Richman
Edgar P. and Elizabeth C. Bartlett Professor of Law
Professor of Business Administration

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WRITER'S DIRECT NUMBER

(212) 701-3154

April 25, 2023

Re: Application of P.J. Austin

Dear Judge:

It is my pleasure to provide this letter of recommendation for P.J. Austin as he seeks a role as a judicial clerk in Your Honor's chambers. I served as P.J.'s mentor partner during his time at Cahill last summer, and in that capacity I worked closely with him as we prepared for a jury trial. I have supervised hundreds of associates and summer associates over the years and found P.J. to be one of the best. I recommend him without hesitation.

During P.J.'s time at Cahill, we were in the final stage of trial preparation in a long-running antitrust class action. P.J. quickly became an important member of the team, and I found his work to be extremely impressive.

Among several projects, P.J. got up to speed on complex evidentiary issues and conducted research to support one of our key *in limine* motions relating to subsequent remedial measures. With only minimal guidance and direction, P.J. was able to identify the strongest points and supporting authorities. He designed the argument that ultimately prevailed when the motion was filed. He wrote a polished first draft of the brief that demonstrated his ability to deliver quality work on a tight deadline.

P.J. was undaunted by the massive evidentiary record and long procedural history in the case; he found ways to contribute meaningfully from his first week. He effectively brought to bear his prior experience as a judicial intern, and his insights from case law research, to help us prioritize and reframe legal arguments.

His intellectual curiosity helped us look at familiar problems from a new perspective. He asked insightful questions and seemed genuinely interested in complex legal

issues. More than that, P.J. brought his fresh perspective to our evaluation of the facts and witnesses. As a first generation law student, P.J. was able to look past the "lawyering" to help us evaluate witness testimony that would be powerful with the jury. P.J. impressed me and other members of the team with his intuitive ability to leverage insights from his varied experiences and prior work for our client's benefit.

On a personal level, it was truly a pleasure to have P.J. on our team. He brought tremendous enthusiasm, energy, and a strong work ethic that proved critical as we juggled competing priorities in the lead-up to trial. He looked proactively for ways to contribute and make himself helpful to the effort. He has the rare ability to know when to observe and when to speak up. Those skills served him well at Cahill, as they will serve him well in a busy judicial chambers.

My partners and I were consistently impressed with P.J. and his contributions. I am confident he will be an asset to Your Honor's chambers if he has an opportunity to serve as your law clerk. P.J. has my full and unequivocal recommendation. I would be pleased to answer any questions Your Honor may have.

Yours truly,

Jason M. Hall

Duke University School of Law
210 Science Drive
Durham, NC 27708

May 31, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: P.J. Austin

Dear Judge Walker:

I am pleased to recommend P.J. Austin for a clerkship in your chambers. P.J. was a successful student in my Federal Courts class this past spring, and I was sufficiently impressed by him that I agreed to advise his law review note this past fall. I am confident that he will succeed as a law clerk and lawyer.

I regard Federal Courts as one of the most difficult classes that the Law School offers—and as essential for clerking and litigating. Many Duke Law students shy away from the class because of its frightening reputation and potentially negative impact on their GPAs. My course covers challenging subjects: *Marbury* as a federal courts case; congressional control of federal-court jurisdiction; the different justiciability doctrines; the ins and outs of state sovereign immunity; Section 1983 litigation and individual officer immunity; the several abstention doctrines; U.S. Supreme Court review of state-court judgments; and federal habeas-corpus review of state-court criminal convictions and sentences.

P.J. worked extraordinarily hard in the course. He was prepared when I called on him, and he occasionally volunteered to try to tackle my tough questions to the class. Outside of class, he participated actively during office hours by asking about course materials or current legal events such as Texas Senate Bill 8 or the constitutionality of expanding the U.S. Supreme Court. Indeed, he was the student in the class who most effectively critiqued—and thereby helped sharpen—the constitutional arguments I make in a forthcoming law review article on packing the U.S. Supreme Court. I really enjoyed having lunch with several of his classmates and him toward the end of the semester.

I fully expect that P.J. will fit in well in the close confines of chambers. He is calm, hard-working, mature, respectful, resilient, unassuming, and well-liked by his professors and peers. He is an absolute pleasure to be around. Unsurprisingly, he received a return offer from his law firm immediately upon completing its summer associate program.

I was recently appointed the Associate Dean for Intellectual Life at the Law School, so this year I have even less time than usual to take on additional responsibilities. Even so, I could not resist saying yes when P.J. asked if I would advise his law review note this past fall. He is just so hard-working and likeable, and he cares about legal and policy questions that matter. He will also add critically needed diversity to the legal profession, including to the group of law clerks that our nation's law schools produce each year.

Please feel free to contact me if I can be of additional help as you consider P.J.'s application. I would be pleased to speak with you about him.

Sincerely yours,

Neil S. Siegel
David W. Ichel Professor of Law and Political Science
Associate Dean for Intellectual Life
Director, Duke Law Summer Institute on Law and Policy

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WRITING SAMPLE

The attached writing sample is a memorandum that I wrote for my judicial internship with Judge Mary Ellen Coster Williams in the summer of 2021. In the memo, I was asked to address whether the plaintiff's torts claims were barred by the statute of limitations. No other person aided in the preparation of this memorandum. The party names and locations have been altered for confidentiality.

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MEMORANDUM

TO: Senior Judge Mary Ellen Coster Williams
FROM: P.J. Austin
CC: Alex Prime
DATE: July 28, 2021
RE: Are QC's tort claims barred by the statute of limitations?

Question Presented

Are QC's tort claims barred by the statute of limitations?

Brief Answer

Likely not. Generally, the statute of limitations period in Massachusetts is three years for tort claims. However, Massachusetts courts have adopted a discovery rule which provides that the state of limitation begins to run when a plaintiff knows or reasonably should know that she may have been harmed by a defendant's conduct. Alternatively, courts do not enforce the statute of limitations where the statements lulled the plaintiff into the false belief that it was not necessary for him to commence action within the statutory period of limitations. Here, QC did not discover RED's involvement in drafting the request for proposals ("RFPs") until 2016. Further, RED and ABC Agency appeared to work in tandem to reassure QC that it would be made whole by equitable adjustment. Therefore, QC torts claims were equitably tolled and fall within the statute of limitations period.

Facts

Plaintiff QUALITY CONSTRUCTION ("QC") brought action against Defendant RED International Inc. ("RED") for tort claims in relation to a contract between QC and the United States ABC Agency ("ABC"). Compl. Against RED Int'l Inc. ("D.C. Comp.") at 1, ECF No. 1.

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In late 2014, QC entered into the Schools Contract and the Clinic Contract ("Contracts") with ABC Agency to prepare final designs for the rebuilding of multiple schools and a health clinic in Costa Rica after Tropical Storm Sarah. *Id.* at 10–11. In accordance with a prior contract between RED and ABC Agency, RED was to be the Architectural Engineer ("A/E") for the Contracts' projects. *Id.* at 5.

Now, QC alleges RED conducted itself in a way that warrants tortious liability. QC submits claims of tortious interference, misrepresentation, civil conspiracy (coercive and concerted action), and unjust enrichment. *Id.* at 37–41. The alleged tortious behavior began with RED's part in drafting amendments to the Schools RFPs in 2014, which QC alleges were misrepresented and induced their bid. QC's Mem. in Opp'n. to Def. RED Int. Inc.'s Mot. Summ, J. ("QC's Resp. to MSJ") at 17, ECF No. 92; Resp. of Pl. QC to Rev. Stmt. Mat. Facts in Supp. of Def. RED Int. Inc.'s Mot. Summ. J. ("QC's Resp. to SMF") at 35, ECF No. 93. The amendments to the RFPs stated that all ancillary permits and property titles would be provided and presented no legal issues. QC's Resp. to MSJ at 17, ECF No. 92.

However, all permits were not provided and the property titles did have legal issues. *Id.* QC claims it was not aware that RED had participated in drafting the amendments to the RFPs until it received information through the Freedom of Information Act ("FOIA") requests. QC's Resp. to SMF at 18, ECF No. 93. Therefore, QC is arguing that it was unaware that RED was partially responsible for the alleged harm and the statute of limitations period should begin when QC discovered that information through the FOIA requests. QC's Resp. to MSJ at 11, ECF No. 92.

Further, during QC's performance of the Contracts, QC claims that it was continuous impeded by RED. QC alleges RED intentionally submitted defective preliminary designs and

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used its role as A/E to deflect blame and costs onto QC. Mem. and Order ("Saris' Order") at 5, ECF No. 30. QC initially sought remedy through administrative procedures by filing requests for equitable adjustments. QC's Resp. to MSJ at 6, ECF No. 92. QC alleges that it believed it may have been made whole from the adjustments based on representations from RED and ABC Agency and therefore, postponed filing suit to against them. QC's Resp. to MSJ at 6, ECF No. 92. In response to QC's requests for equitable adjustment, the Contracting Officer ("CO") issued his final decisions on October 15, 2018. QC was not satisfied with the CO's judgment and filed suit on November 9, 2018 against RED and ABC Agency. *Id.*

Discussion

Generally, the statute of limitations period in Massachusetts is three years for tort claims. Mass. Gen. Laws ch. 260, § 2A; *RTR Tech., Inc. v. Helming*, 707 F.3d 84, 89 (1st Cir. 2013). Usually, a plaintiff's cause of action begins accrues at the time of his injury. *Id.* However, Massachusetts courts have adopted a discovery rule which provides that "a cause of action accrues, and the statute of limitations begins to run, when a plaintiff knows or reasonably should know that she may have been harmed by a defendant's conduct, even if the harm actually occurred earlier." *Id.*; *See also Keane, Inc. v. Swenson*, 81 F.Supp.2d 250, 255 (D. Mass. 2000).

The discovery rule only applies to plaintiff's injuries that were "inherently unknowable." *RTR Tech.*, 707 F.3d at 90. A "plaintiff need not know the extent of the injury or know that the defendant was negligent for the cause of action to accrue." *Id.* (quoting *Williams v. Ely*, 423 Mass. 467 (1996)). Plaintiff need only know that he sustained an appreciable harm as a result of the defendant's conduct. *Id.* Factual disputes regarding when the plaintiff knew or should have known are typically submitted to a factfinder, unless admitted or undisputed facts allow a

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determination as a matter of law. *Salois v. Dime Sav. Bank of New York, FSB*, 128 F.3d 20, 26 (1st Cir. 1997).

Additionally, when a plaintiff fails to bring timely claims based reasonable reliance on representations by defendant regarding a settlement, courts do not enforce the statute of limitations where the representations "lulled the plaintiff into the false belief that it was not necessary for him to commence action within the statutory period of limitations." *Deisenroth v. Numonics Corp.*, 997 F.Supp. 153, 157 (D. Mass. 1998) (Saris opinion) (internal quotations omitted). Under the Contracts Dispute Act, a plaintiff is required to "exhaust available administrative remedies by first submitting a 'claim'[1] to and obtaining a 'final decision' from the contracting officer." *Sarang*, 76 Fed.Cl. at 564 (citing 41 U.S.C. § 605(a)). Courts have recognized that a plaintiff may be entitled to equitable tolling of the statute of limitations while its exhausting administrative remedies. *Dillon v. Dickhaut*, 2013 WL 2304175, at *4 (D. Mass. May 24, 2013). *Contra Holloman v. Clarke*, 208 F.Supp.3d 373, 378 (D. Mass. 2016) (noting the First Circuit has not "determined whether federal or state equitable tolling principles apply").

This memorandum will begin by addressing the application of the First Circuit's statute of limitations doctrine to (1) the RFP amendments. Then, the memorandum will address the

[1] "Claim" is undefined by the CDA. *See Sarang Corp. v. United States*, 76 Fed.Cl. 560, 564 (2007) (citing 41 U.S.C. § 605(a)). The term is defined in the Federal Acquisition Regulations as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 C.F.R. § 52.233–1(c).

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application of the doctrine to (2) the remaining claims and whether there is a possibility that the claims will be equitably tolled.

I. Here, a reasonable jury will likely hold that its claims regarding the misrepresentations in the RFP amendments were equitably tolled per the discovery rule.

QC alleges it became aware of its alleged injury regarding the misrepresentations in the amended RFPs within months of signing the Contracts in 2014. QC's Resp. to MSJ at 11, ECF No. 92. Therefore, the time of QC's injury would fall outside of the statute of limitation's three-year period because it occurred before November 9, 2015 (3 years before the current action commenced on November 9, 2018). *See RTR Tech.*, 707 F.3d at 89.

However, QC correctly alleges that period is tolled by the discovery rule. *See Puritan Med. Ctr. v. Cashman*, 413 Mass. 167, 175 (1992). The question of whether QC exercised reasonable diligence and should have known RED's partial role in drafting the RFPs amendments is not so clear cut as to permit a determination as a matter of law. *See Salois*, 128 F.3d at 26. Unlike the plaintiff in *Salois*, the documents provided to QC did not contain the relevant information. *See id.*

Still, RED could argue that QC's should have exercised diligence by inquiring into RED's involvement at the time since it was notifying ABC Agency of defects in the preliminary designs provided by RED. However, if the question is submitted to a factfinder, he could find it was "inherently unknowable" that RED helped draft the amendments to the RFP given the information provided to QC at the time of the injury. *See id.* Therefore, a reasonable jury could find that QC's misrepresentation claims regarding the amendments to the RFPs are timely because the limitations period is tolled until 2016 when QC discovered RED's role in drafting the statements. *See RTR Tech.*, 707 F.3d at 89.

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II. Regarding the remaining claims, a reasonable jury will likely find that QC's tort claims are equitably tolled until the CO issued its final decision on October 15, 2018.

Here, a reasonable jury will likely find that QC's remaining tort claims are equitably tolled until the CO issued its final decision on October 15, 2018. The parties argue alternate timelines regarding when QC allegedly suffered appreciable harm sufficient to trigger the statute of limitations period.[2] Rev. Mem. in Supp. of Def. RED Int. Inc.'s Mot. Summ. J.("RED's MSJ") at 20, ECF No. 86; QC's Resp. to MSJ at 15, ECF No. 92. Accordingly, despite RED's contention that the issue is clearly in their favor, there is a factual dispute regarding when QC suffered its alleged appreciable harm.

In relation to all its claims, QC provides a few examples of case law where it was debatable whether there was sufficient evidence to show the plaintiff knew or should have known it suffered appreciable harm at the time of the alleged tort. QC's Resp. to MSJ at 6, ECF No. 92. QC argues that it is possible that it may have been "made whole" and not have suffered appreciable harm because of equitable adjustments to the contract. QC's Resp. to MSJ at 6, ECF No. 92. Therefore, it argues harm the injury did not accrue until a final decision was made by the CO. QC's Resp. to MSJ at 6, ECF No. 92. However, utilizing the reasoning within two cases QC cites to prove this argument, the potential for equitable adjustments does not

[2] RED argues that appreciable harm for QC's alleged tort claims accrued in late-2014 or by August 27, 2015 since it claims QC believed it had been seriously wronged by the combined actions of ABC Agency and RED by that time. RED's MSJ at 20, ECF No. 86. QC argues that the appreciable harm could not have accrued until at least April 2016 "when it began to suffer harm beyond the increased project costs which QC was entitled to recover via equitable adjustment and which were subject to ongoing negotiations with ABC Agency." QC's Resp. to MSJ at 7, ECF No. 92.

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necessarily bar an accrual until the final decision is rendered by the CO because a reasonable jury could possibly find measurable harm before the final decision.[3]

For example, the following hypothetical is a situation where a reasonable jury could find appreciable harm when QC discovered defects in the preliminary designs in 2014. Here, since QC has demonstrated intentions to quantify the extent the preliminary designs were inadequate, expert testimony could be utilized to approximate a measurable detriment at the time QC alleged the defects existed in 2014. *See id.* at 268–69. Accordingly, since QC alleged a vast number of defects in 2014, a reasonable fact finder could find that QC could have reasonably foresaw that its damages would surpass any equitable adjustment available to it under any administrative remedy. *See id.* at 268–69.

Regarding QC's other alleged occurrences of harm in its torts claims, using similar reasoning to find measurable harm would be more difficult. For example, quantifying appreciable harm regarding RED's alleged delays in the approval of final designs under QC's tortious interference claim would be more difficult. QC's Resp. to MSJ at 5–6, ECF No. 92. Therefore, a jury may reasonably find that the other alleged tortious actions only caused appreciable harm when QC began to suffer harm beyond the increased project costs as QC argues. *See Salois*,128 F.3d at 26.

[3] The court in *Boston Prop.* recognized that a measurable detriment satisfies plaintiff's knowledge of an appreciable harm. *Boston Prop. Exch. Transfer*, 686 F.Supp.2d 138, 145–46 (D. Mass. 2010). Moreover, the court in *Mass. Elec.* recognized that an appreciable harm occurred before the extent of the harm was determined when filing a law suit clearly would result in the incurrence of substantial expenses. *Mass. Elec. Co. v. Fletcher, Tilton & Whipple, P.C.*, 394 Mass. 265, 268–69 (1985).

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a. A reasonable jury may find the torts claims are not necessarily tolled until all administrative remedies are exhausted.

Here, QC argues that its claims must be equitably tolled until all administrative remedies were exhausted. QC's Resp. to MSJ at 13, ECF No. 92. However, to support this conclusion, QC cites case law which is not binding on the First Circuit. QC's Resp. to MSJ at 13, ECF No. 92. In contrast to QC's case law, the court in *Holloman* noted that the First Circuit has not "determined whether federal or state equitable tolling principles apply." *Holloman*, 208 F.Supp.3d at 378. Therefore, a reasonable jury could determine QC's claims were not tolled during the time QC sought administrative remedies.

b. A reasonable jury may find that RED's conduct in tandem with ABC Agency is sufficient to constitute the necessary "lulling" that would grant QC equitable tolling.

Alternatively, a reasonable jury may find that the statute of limitation period must be tolled because RED and ABC Agency "lulled the plaintiff into the false belief that it was not necessary for him to commence action within the statutory period of limitations." *See Deisenroth*, 997 F.Supp. at 157. QC alleges that it engaged with both ABC Agency and RED in its request for equitable adjustment. QC's Resp. to MSJ at 14, ECF No. 92. Further QC alleges that ABC Agency represented to QC that it would consider its submissions in good faith and award equitable adjustments that were justified and reasonable. QC's Resp. to MSJ at 14, ECF No. 92. However, QC claims ABC Agency relied on recommendations from RED that were not based on architectural or engineering standards, and consequently did not provide fair and equitable solutions. *See* QC's Resp. to MSJ at 14, ECF No. 92. Accordingly, a reasonable jury may find that RED's conduct in tandem with ABC Agency is sufficient to constitute the necessary "lulling" and therefore equitably toll QC's accrual of injury. *See Deisenroth*, 997

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F.Supp. at 157. However, because QC only dealt with ABC Agency directly and RED only tangentially as an advisor of ABC Agency during the equitable remedy proceedings, a reasonable jury may alternatively find that RED did not lull QC into any false belief regarding commencing an action, which would mean QC's claims were not tolled. *See id.*

Conclusion

For the foregoing reasons, QC's torts claims likely fall within the statute of limitation period.

Applicant Details

First Name	**Fable**
Middle Initial	**J**
Last Name	**Avison**
Citizenship Status	**U. S. Citizen**
Email Address	**fable.avison@law.nyls.edu**
Address	**Address** Street **125 Magnolia Avenue** City **Jersey City** State/Territory **New Jersey** Zip **07306** Country **United States**
Contact Phone Number	**7326102225**

Applicant Education

BA/BS From	**Smith College**
Date of BA/BS	**May 2018**
JD/LLB From	**New York Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23308&yr=2011**
Date of JD/LLB	**June 1, 2023**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**New York Law School Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**New York Law School Moot Court Association**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Social Security**

Recommenders

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Purcell, Edward
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 25, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman
United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

My name is Fable Avison and I am applying for a law clerk position in your chambers for the term beginning in August 2024. I am a recent graduate of New York Law School, graduating Magna Cum Laude and standing within the top 4% of my class. I have worked towards a federal clerkship throughout law school by prioritizing relevant courses such as federal courts, legal research, and judicial internships in the Southern District of New York and the District of New Jersey.

I am seeking a clerkship to continue to engage with questions about what the law is and how its terms should be understood I am interested in working with Your Honor because of your dedication to public service. I am particularly interested to learn from your experience and to engage with the procedural and threshold questions that trial court judges are often asked to answer in the early stages of litigation.

I have demonstrated proficiency in my legal studies throughout law school and have assumed an editorial board position on the New York Law School Law Review. As Executive Notes and Comments Editor for the Law Review, my role was to help students develop novel legal theories and to find their voice through their writing. The job requires expertise in diverse areas of the law on short notice and a mastery of the Bluebook—two of my favorite facets of the role. Last month, my Case Comment discussing a federal trade secrets case decided in the Southern District of New York was published in the second issue of Volume 67 of the New York Law School Law Review.

Currently, (in addition to preparing for the New York Bar Exam) I am assisting Professor David Schoenbrod as his research assistant. In this role, I am assisting with the drafting and editing of a book concerning American politics and civics. This project involves a diverse study, from Greek mythology to *The Federalist Papers*. At this stage in the project, my role is largely editorial. This opportunity to work closely with a professor on a piece of writing has been a privilege. I have worked to maintain the author's voice while making thoughtful suggestions when relevant. I cannot think of anything more relevant for a future law clerk who will soon be tasked with research projects and similar editorial tasks.

.

My dedication to the federal judiciary's work and research and writing skills make me the perfect candidate to serve as a law clerk in your chambers. Thank you for your consideration.

Respectfully,
Fable J. Avison

FABLE J. AVISON

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EDUCATION

New York Law School, New York, NY
Juris Doctor, June 2023
GPA: 3.86
Rank: 10/251
Honors: *Magna Cum Laude*, Dean's Leadership Council, Dean's List High Honors, Trustee Scholar (full-tuition, merit-based scholarship)
Activities: *New York Law School Law Review*: Executive Notes & Comments Editor, New York Law School Moot Court Association, Teaching Assistant: Constitutional Law, Civil Procedure, Evidence
Publication: *Zurich American Life Insurance Company v. Nagel*, 67 N.Y.L. SCH. L. REV. 81 (2023)

Smith College, Northampton, MA
Bachelor of Arts, Government May 2018
Concentration: Political Theory

EXPERIENCE

Professor David S. Schoenbrod, (New York Law School) New York, NY
Research Assistant, Current
Assisting with the drafting and research for an upcoming book discussing American politics and the history of government .

Shearman & Sterling LLP, New York, NY
Summer Associate, Summer 2022
Reported on research on legal issues pertaining to antitrust litigation and internal investigations concerning unfair competition. Worked closely with the firm's foreign anti-corruption practice to research whistleblower protections.

The Honorable George B. Daniels, U.S. District Court for the Southern District of New York, New York, NY
Judicial Extern, Spring 2022
Drafted judicial opinions and conducted research on complex litigation matters including Social Security benefits.

Veterans Justice Field Placement (Manhattan Legal Services), New York, NY
Extern, Fall 2021
Provided legal services to low-income veterans in the New York City area. Researched and drafted client responses and litigation documents regarding small claims, housing disputes, child support arrears, and Social Security claims.

The Honorable Madeline Cox Arleo, U.S. District Court for the District of New Jersey, Newark, NJ
Judicial Intern, Summer 2021
Researched and drafted motion responses and opinions for a wide range of legal issues including civil rights matters and social security disability benefits.

Harrison, Harrison & Associates, Ltd., New York, NY
Legal Assistant, 2019–21
Drafted and assisted with the production of documents, client intakes, and court proceedings for a boutique employment law firm.

SKILLS & INTERESTS

Olympic Weightlifting (Competed in U-25 National Championships, 2021); World Travel; Historical Fiction

6/15/2023

@00083755 Ms Fable Avison Degree Sought: JD

Fall 2020

Course		Credits	Final Grade	Level
REQ 550	Torts - 2MB	4	B+	01
LWR 201	Legal Practice I - L2D	3	CR	01
REQ 400	Criminal Law - 2L	3	B	01
REQ 300	Contracts - 2SD	4	B+	01
REQ 080	Foundations for Study of Law	1	P	01

	Attempted	Earned	GPA Crd	QPnts	GPA
Term:	15	15	15	15	3.24
Total Institution:	*87*	*87*	*87*	*266.2*	*3.86*

Spring 2021

Course		Credits	Final Grade	Level
REQ 105	Advanced Legal Methods - 2A	2	A	01
REQ 100	Civil Procedure - 2	4	A	01
LWR 301	Legal Practice II - L2D	4	A	01
REQ 150	Legislation & Regulation - 2	1	P	01
REQ 500	Property - 2	4	A	01
REQ 081	Foundations for Professionalsm	0	P	01

	Attempted	Earned	GPA Crd	QPnts	GPA
Term:	15	15	15	15	4.00
Total Institution:	*87*	*87*	*87*	*266.2*	*3.86*

Summer 2021

Course		Credits	Final Grade	Level
BUS 210	Corporations	4	A	01

	Attempted	Earned	GPA Crd	QPnts	GPA
Term:	4	4	4	4	4.00
Total Institution:	*87*	*87*	*87*	*266.2*	*3.86*

Fall 2021

Course		Credits	Final Grade	Level
REQ 200	Constitutional Law I	3	A	01
REQ 650	Evidence	3	A	01
JRN 100	Law Review - Legal Scholarship	0	CR	01
LRJ 500	Law Review Member I	1	CR	01
CLC 520	Veterans Justice Field Placmnt	2	A-	01
LWR 340	Drafting: Litigation	2	A-	01
CLC 521	Veterans Justice Seminar	2	A-	01

	Attempted	Earned	GPA Crd	QPnts	GPA
Term:	13	13	13	13	3.84
Total Institution:	*87*	*87*	*87*	*266.2*	*3.86*

6/15/2023

@00083755 Ms Fable Avison Degree Sought: JD

Spring 2022

Course		Credits	Final Grade	Level
REQ 250	Constitutional Law II	3	A+	01
EXT 210	Judicial Externship Seminar	1	A	01
EXT 800	Jud Extern Placement: Fed Jud	2	P	01
LRJ 501	Law Review Member II	1	CR	01
MJD 120	Federal Courts/Federal System	3	A	01
REQ 450	Professional Responsibility	3	A+	01
ILS 375	Law of Economics of Litigation	1	P	01

	Attempted	Earned	GPA Crd	QPnts	GPA
Term:	14	14	14	14	4.20
Total Institution:	*87*	*87*	*87*	*266.2*	*3.86*

Fall 2022

Course		Credits	Final Grade	Level
EST 140	Wills, Trusts&Future Int. - O	4	A-	01
CRI 100	Crim Pro: Investigation - EVE	3	A+	01
LRJ 900	Law Review Exec Bd I	2	CR	01
MCA 902	Moot Court Member	1	CR	01
LWR 310	Legal Research in Digital Wrld	3	A+	01

	Attempted	Earned	GPA Crd	QPnts	GPA
Term:	13	13	13	13	4.07
Total Institution:	*87*	*87*	*87*	*266.2*	*3.86*

Spring 2023

Course		Credits	Final Grade	Level
MBE 101	Introduction to the MBE - O	3	B+	01
JLH 504	Persuasion	2	A	01
BUS 300	Accounting & Data Analysis - O	2	P	01
LRJ 901	Law Review Exec Bd II	2	CR	01
MCA 902	Moot Court Member	1	CR	01
CON 527	The First Amendment	3	A	01

	Attempted	Earned	GPA Crd	QPnts	GPA
Term:	13	13	13	13	3.75
Total Institution:	*87*	*87*	*87*	*266.2*	*3.86*